No. _____

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IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

OCTOBER TERM, 1994

STEPHEN MCKNIGHT, in his capacity as personal representative of the estate of ROY MCKNIGHT, and MYLAN PHARMACEUTICALS, INCORPORATED, a West Virginia corporation,

Petitioners,

—v.—

AMERICAN CYANAMID COMPANY, a Maine corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court has not articulated standards to determine when a corporate defamation plaintiff is a public figure. In this case, the defamation plaintiff is one of the nation's largest corporations, a publicly traded, multi-billion dollar company, which has been held to be a private figure under *Gertz*. The questions presented are:

1. Is American Cyanamid Company an all-purpose public figure?

2. Is American Cyanamid Company a limited-purpose public figure with respect to speech about its corporate conduct in marketing a hypertension drug used by hundreds of thousands of people throughout the country?

PARTIES BELOW

The parties before this Court are those set forth in the caption. Upon the death of Roy McKnight, a third-party counterclaim defendant below, on November 6, 1993, his son Stephen was substituted as personal representative of Mr. McKnight's estate.

Rule 29.1 Statement

Pursuant to Rule 29.1, petitioners inform the Court that Mylan Pharmaceuticals, Inc., is a wholly-owned subsidiary of Mylan Laboratories, Inc., a publicly held corporation.

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American Family Mutual Insurance Co. v. Edgar, 23 Media L. Rep. (BNA) 1555 (Wis. Cir. Ct. 1995) 18n, 19n

Bank of Oregon v. Independent News, Inc., 693 P.2d 35 (Or.), *cert. denied*, 474 U.S. 826 (1985) 15, 26n

Beech Aircraft Corp. v. National Aviation Underwriters, 11 Media L. Rep. (BNA) 1401 (D. Kan. 1984) 14, 18n, 19n

Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681 (4th Cir. 1989) 15, 20n

Bose Corp. v. Consumers Union of United States, Inc., 508 F. Supp. 1249 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984) 10n, 11, 27n

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 11

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) 13

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Continental Cablevision, Inc. v. Storer Broadcasting Co., 653 F. Supp. 451 (D. Mass. 1986) 13

Coronado Credit Union v. KOAT Television, Inc., 656 P.2d 896 (N.M. Ct. App. 1982) 15, 18n

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Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 19

Dairy Stores, Inc. v. Sentinel Publishing Co., 516 A.2d 220 (N.J. 1986) 11, 13n

Dodrill v. Arkansas Democrat Co., 590 S.W.2d 840 (Ark. 1979), *cert. denied*, 444 U.S. 1076 (1980). 26n

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 24n, 25n

FoodScience Corp. v. McGraw-Hill, Inc., 592 F. Supp. 362 (D. Vt. 1984) 27n

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Marcone v. Penthouse International Magazine For Men, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) 27

Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976) 12, 13

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National Life Insurance Co. v. Phillips Publishing, Inc., 793 F. Supp. 627 (D. Md. 1992) 11

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 3, 6, 9

Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977) 14, 18n

Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) 10

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Silvester v. American Broadcasting Cos., 839 F.2d 1491 (11th Cir. 1988) 14, 25

Snead v. Redland Aggregates Ltd., 998 F.2d 1325 (5th Cir. 1993), *cert. dismissed*, 114 S. Ct. 1587 (1994) 10n, 19

Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980) 16, 27n

Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987) 26

Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977) 13

Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417 (N.J. 1995) 13n

U.S. Healthcare, Inc. v. Blue Cross, 898 F.2d 914 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990) 21n

Vegod Corp. v. American Broadcasting Cos., 603 P.2d 14 (Cal. 1979), *cert. denied*, 449 U.S. 886 (1980) 14, 26n

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Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) 26

WTSP-TV, Inc. v. Vick, 11 Media L. Rep. (BNA) 1543 (Fla. Cir. Ct.), *appeal dismissed*, 475 So. 2d 703 (Fla. Ct. App. 1985) 18n

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Law Reviews

K. Dotseth, Note, *Redefining the Corporate "Jellyfish": Corporate Plaintiffs in Defamation Actions*, 14 J. Corp. L. 907 (1989)..... 11

P. Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish*, 68 Iowa L. Rev. 35 (1982) 12n

J. Hilbert, Comment, *A Criticism of the Gertz Public Figure/Private Figure Test in the Context of the Corporate Defamation Plaintiff*, 18 San Diego L. Rev. 721 (1981) 16

A. Langvardt, *Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 Minn. L. Rev. 309 (1993)..... 10n

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Newspapers and other Periodicals

Cowan, *Wall Street: Did the Short-Seller Stumble?*, New York Times, Aug. 19, 1990, § 3 at 14, col. 3 4

First In-First Out ANDA Review Policy, F-D-C Reports (Pink Sheet), Apr. 22, 1991, p. 8 5

Fortune 500, Fortune, Apr. 28, 1986, p. 186 ..... 17n

Marano, *Prescription for Success: Mylan Battles FDA, Market Forces to Succeed in Volatile Industry*, Pittsburgh Bus. Times & J., Nov. 26, 1990, § 3, p. 9 4

Waldholz, *Mylan Labs Unveils Dyazide-Like Drug for Blood Pressure*, Wall St. J., Nov. 9, 1984, at 7, col. 1 ..... 22n

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Treatises

R. Sack & S. Baron, *Libel, Slander, and Related Problems* (2d ed. 1994) 10n, 13n

B. Sanford, *Libel and Privacy* (2d ed. 1994) 11

R. Smolla, *Law of Defamation* (1994) 11, 15n, 25n

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit that a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case, entered on March 3, 1995.

OPINIONS BELOW

The opinion of the court of appeals, *per curiam*, is unreported and is reprinted in the Appendix hereto ("App.") at 1a-18a. The district court opinion is unreported and is reprinted in the Appendix hereto at 19a-48a.

JURISDICTION

The judgment of the court of appeals from which petitioners seek review was entered on March 3, 1995. This petition is being timely filed within 90 days of that decision.

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1332 (1988). The court of appeals had jurisdiction to hear the ensuing appeal pursuant to 28 U.S.C. § 1291 (1988). The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the First Amendment and the Fourteenth Amendment, Section 1, to the United States Constitution are set forth in the Appendix at 51a.

STATEMENT OF THE CASE

This petition concerns a defamation claim brought by respondent American Cyanamid Company ("Cyanamid") as one of four counterclaims in an action originally filed by petitioner Mylan Pharmaceuticals, Inc. ("Mylan"), in November 1990 in the United States District Court for the Northern District of West Virginia. The original action arose out of a 1984 contract between Mylan and Cyanamid under which Cyanamid's Lederle Laboratories division was granted the exclusive right and license to market a prescription drug for treatment and control of hypertension, Maxzide®, which had been developed and patented by Mylan. Mylan contended (and Cyanamid denied) that Cyanamid had breached the contract in several respects, among them by failing to exert the level of effort in marketing Maxzide® that had been specified in the agreement. Cyanamid named Roy McKnight

("McKnight"), then Mylan's Chairman and C.E.O., as a third-party counterclaim defendant with respect to the defamation count only.

All the claims and counterclaims in the suit were dismissed, some on pretrial motions (including the defamation counterclaim, as to which the district court granted summary judgment in favor of McKnight and Mylan) and the remainder upon a jury verdict after a trial in the fall of 1993. All parties appealed to the United States Court of Appeals for the Fourth Circuit, which upheld the trial court's disposition as to all matters except the grant of summary judgment on Cyanamid's defamation counterclaim. As set out in more detail below, the district court had determined that Cyanamid was a public figure for purposes of the defamation action; that in order to prevail it was obliged to demonstrate that alleged statements of McKnight and Mylan had been made with actual malice as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny; and that Cyanamid had failed to make the required showing to withstand the summary judgment motion made by McKnight and Mylan. The Fourth Circuit reversed on the ground that Cyanamid was not a public figure and remanded the counterclaim for adjudication under the less demanding standard of proof applicable to private figure defamation plaintiffs.

A. The Statements at Issue

Cyanamid's defamation counterclaim is based on four statements which it claims were made by Roy McKnight or by Patricia Sunseri, Vice President for Investor and Public Relations of Mylan Laboratories, Inc., petitioner's parent company. The earliest statement, chronologically, was attributed to Sunseri in a *New York Times* article:

> "It's not our intent to license [any branded drug] again," Ms. Sunseri said. She said that after Lederle paid a small up-front fee for the right to sell Maxzide, and oversaw a

> promising launch, the drug languished while Lederle's sales force pushed other products.

Cowan, *Wall Street: Did the Short-Sellers Stumble?*, N.Y. Times, Aug. 19, 1990, § 3, at 14, col. 3; J.A. 459.[1]

The second was attributed to McKnight in an article published in a Pittsburgh business newspaper:

> But less encouraging for Mylan has been its experience with Maxzide . . . . McKnight is not pleased with Lederle's performance, and he issued a strong warning.
>
> "Lederle's sales and efforts have been a great disappointment to us. Lederle literally is not living up to their contract, and if they don't straighten up their act, then we'll have to take whatever steps have to be done to change that," McKnight said.

Marano, *Prescription for Success: Mylan Battles FDA, Market Forces to Succeed in Volatile Industry*, Pittsburgh Bus. Times & J., Nov. 26, 1990, § 3, at 9; J.A. 460.

The third alleged defamatory statement was also by McKnight, as part of a response to a question from the audience about the status of Mylan's lawsuit against Cyanamid. The response was given after a speech he gave at a generic drug industry conference in New York in April 1991. It was subsequently published in an industry newsletter characterized by Cyanamid as a "weekly publication with a broad circulation throughout the pharmaceutical industry" (Cyanamid's memorandum of law in opposition to motion for summary judgment; J.A. 461):

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[1] References to "J.A. ___" are to materials contained in the parties' Joint Appendix to the Record on Appeal below. References to "Tr. ___" are to the transcript of the trial of this action. References to "Def. Ex. ___" are to exhibits offered by Cyanamid at the trial.

> Our orders from Lederle have really dwindled. In fact, at the moment they're nonexistent. . . . They're digging their hole deeper and deeper.

First In-First Out ANDA Review Policy, F-D-C Reports (Pink Sheet), Apr. 22, 1991, at 7-8; J.A. 317, 624.

The fourth was a statement attributed to Sunseri by Glenn Reicin, a financial analyst at Oppenheimer & Co., Inc., who set forth the following in a report to investors dated July 19, 1991:

> [Mylan's] sales are weak since American Cyanamid has stopped ordering the company's largest selling product, Maxzide (anti-hypertensive). We estimate that Maxzide sales fell in the $15 million area in fiscal 1991. . . . Mylan has sued Cyanamid for not promoting Maxzide to the best of its ability. Mylan wants the product back. Unfortunately, Cyanamid responded with a cut-off in orders for the product.

J.A. 248, 267.[2]

B. The Opinion of the District Court

By opinion filed on July 27, 1993 (reprinted in the Appendix hereto at 19a-48a), the district court, *inter alia*, granted summary judgment to McKnight and Mylan on Cyanamid's defamation counterclaim. (App. 47a) After setting forth the statements which Cyanamid alleged defamed it,

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[2] Without alleging any additional statements by McKnight or Mylan, Cyanamid also complains of an item in a pharmaceutical industry newsletter which reported on analyst Reicin's report. The item stated, "American Cyanamid has responded to Mylan's $240 million suit against it for alleged violation of a marketing agreement for . . . Maxzide, by ceasing all orders of the product from Mylan, according to . . . Reicin. Mylan has noted that sales of Maxzide were depressed in fiscal 1991; Mr. Reicin estimates that sales could have fallen by $15 million, compared with the previous year." SCRIP, Aug. 14, 1991 (unpaged); J.A. 462-63, 571.

the court analyzed the claims in light of this Court's decisions in *New York Times Co. v. Sullivan*, *supra*, and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in order to determine whether Cyanamid was a public or private figure. (App. 41a) If Cyanamid was a public figure, the court observed, it was obliged to demonstrate with convincing clarity that petitioners acted with " 'actual malice,' a constitutional term of art defined as publishing a statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.' " *Id.*

The district court then set forth some of the different tests utilized by lower courts after this Court's decision in *Gertz* to determine if a defamation plaintiff is a "limited" or "vortex" public figure for purposes of a libel suit. It found, in essence, that such status is warranted where the speech complained of relates to a public controversy into which the plaintiff voluntarily injected itself through conduct that would foreseeably invite attention and scrutiny, and as to which plaintiff had access to the media and thus "effective opportunities for self-help when defamed." (App. 42a-44a)

The court also observed that special considerations are implicated in the public figure analysis when the plaintiff is a corporation—considerations which, it noted, have not yet been addressed by this Court. These include "the fact that corporations are deemed to be fictional entities who could be said to have no 'reputational interest' or 'feelings'; that an issue of business conduct or 'commercial speech' exists; and that corporations are often 'pervasively visible and powerful economic, political and social forces in American life.' " (App. 45a) The court concluded that

> there is no question that Cyanamid, a large publicly traded international corporation, volunteered for an activity out of which publicity was generated through the comments made by McKnight and Sunseri. It willingly and for well-understood reasons entered into the mar-

> keting agreements with Mylan, which dealt with an important drug for the treatment of hypertension, one which both Cyanamid and Mylan hoped and expected would displace a rival company's drug, Dyazide®, thus generating large profits for both Mylan and Cyanamid. As Cyanamid put it, Mylan needed the 'expertise and resources of a company accustomed to marketing branded pharmaceutical products in order to market the new drug effectively.'

(App. 45a) The district court pointed out that in the pretrial order Cyanamid had itself informed the court that its promotion of Maxzide® was launched

> with virtually unprecedented intensity, using a broad spectrum of media to create product awareness and name recognition quickly, and more importantly, to educate the medical community as to the pharmacological features of the new drug. The launch also included intense selling efforts aimed at drug wholesalers and retailers to ensure well-stocked pharmacy shelves ready to fill prescriptions written as a result of Cyanamid's promotional efforts. After the launch, Cyanamid sustained aggressive marketing and promotional efforts, using a variety of techniques to maintain a high level of awareness of Maxzide® among prescribing physicians.

(App. 45a-46a) The district court continued:

> Maxzide® is, according to Cyanamid, a commercial success, prescribed by tens of thousands of doctors for use by hundreds of thousands of patients, described in textbooks used at medical and pharmacy schools, as well as drug evaluations published by the American Medical Association and other institutions. Certainly, Cyanamid's involvement with this major drug in a highly competitive and regulated industry would lead it to foresee the activity out of which the alleged defamatory statements would occur.

(App. 46a) The district court further determined that Cyanamid had "considerable access to the general and financial media, including . . . the media involved in covering the pharmaceutical industry." (App. 43a)

Concluding that Cyanamid was a limited-purpose public figure for the purpose of this litigation, the district court then determined that the company had failed, in response to the counterclaim defendants' summary judgment motion, to meet its burden of showing that either McKnight or Mylan had spoken the allegedly defamatory statements with actual malice. (App. 47a)

C. The Court of Appeals Decision

In an opinion rendered on March 3, 1995 (reprinted in the Appendix hereto at 1a-18a), the Fourth Circuit reversed the district court as to the defamation counterclaim, ruling that Cyanamid was a private figure and that the matter should proceed "under the standard applicable to a private individual." (App. 7a) The determination under *Gertz* of whether a party is a limited-purpose public figure, it held, turns solely on a two-part inquiry into, first, the existence of a public controversy giving rise to the alleged defamation and, second, the nature and extent of the plaintiff's participation in the controversy. (App. 6a)

The court concluded that there was no public controversy in this case because "[t]he conflict between Mylan and Cyanamid is a purely private contractual dispute," and "[t]he allegedly defamatory statements dealt only with the adequacy of Cyanamid's marketing efforts; they did not deal with any issues that could potentially affect the public." (App. 7a) Though acknowledging that Cyanamid had "voluntarily put[ ] itself into the public eye" through the intensity of its efforts in marketing Maxzide®, the court found no relevant connection between that conduct and the subject of the dispute because "the adequacy of Cyanamid's marketing efforts . . .

was not part of Cyanamid's promotional message." (App. 6a-7a) The court did not address McKnight's and Mylan's suggestion that Cyanamid could be held to be an all-purpose public figure.

REASONS FOR GRANTING THE WRIT

I. IN THE ABSENCE OF ANY ARTICULATED STANDARDS FROM THIS COURT AS TO WHEN A CORPORATION IS A PUBLIC FIGURE, FEDERAL AND STATE COURTS HAVE ARRIVED AT INCONSISTENT AND CONFLICTING DETERMINATIONS OF CORPORATE PUBLIC FIGURE STATUS

This case presents the question of when a corporate plaintiff in a defamation action may be categorized as a public figure. In *Gertz v. Robert Welch, Inc.*, *supra*, this Court provided guidance in determining when the actual malice standard of proof established in *New York Times Co. v. Sullivan*, *supra*—*i.e.*, clear and convincing evidence that a defamatory statement was made with knowledge of falsity or reckless disregard for truth or falsity—should be imposed on libel plaintiffs who are not public officials but who nonetheless "have assumed roles of especial prominence in the affairs of society." *Gertz*, 418 U.S. at 345. Some of these public figures, the Court stated,

> occupy positions of such pervasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.
>
> Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on

> the assumption that . . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.

Id. Moreover, the Court stated, "[P]ublic figures usually enjoy significantly greater access to channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344.

In practice, the process of defining over the past 21 years who is and is not a public figure in a defamation suit has often proved to be exceedingly difficult, likened by one frequently quoted court to "trying to nail a jellyfish to the wall." *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978). The task is especially difficult when the defamation plaintiff in question is a corporation.[3] Since the plaintiff in *Gertz* was an individual, the Court did not have occasion to deal with the

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[3] *See, e.g., Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1329 (5th Cir. 1993) ("The inquiry becomes even more difficult when the libel plaintiff is a corporation, as our prior cases do not establish a method for determining whether a corporation is a public or private figure."), *cert. dismissed*, 114 S. Ct. 1587 (1994); *Kroll Associates v. City of Honolulu*, 833 F. Supp. 802, 805 (D. Haw. 1993) (defining a public figure "becomes even more difficult where the plaintiff is a corporation, as the cases provide no clear guidelines"); *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249, 1271 (D. Mass. 1981) ("Various courts have struggled with the application of *Gertz* and other relevant Supreme Court cases in determining whether a corporation is a public figure for First Amendment purposes, but their conclusions have not been uniform."), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984). *See generally* R. Sack & S. Baron, *Libel, Slander, and Related Problems* § 5.3.8, at 273 (2d ed. 1994) (noting that the "lack of clarity and uniformity in application of public figure-concepts is particularly evident" in the corporate plaintiff context); A. Langvardt, *Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 Minn. L. Rev. 309, 350 (1993) ("When making the public/private figure determination in these cases, lower courts have struggled with the *Gertz* standards, which arose in a noncommercial setting and are not well-suited to corporate plaintiff cases.") (footnote omitted).

special status of corporations—or whether corporations should be treated at all differently from individuals in determining if they are public figures. Since *Gertz*, the issue of how corporate status interacts with public figure status has not been addressed by this Court. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 492 n.8 (1984) (noting district court holding that corporate petitioner was a public figure and declining, as had the court of appeals, to pass on public figure issue).

The absence of such guidance has frequently been commented on by courts and commentators. *See, e.g., National Life Insurance Co. v. Phillips Publishing, Inc.*, 793 F. Supp. 627, 641 (D. Md. 1992) (whether the "public/private figure distinction applies to a corporation has not been explicitly addressed by the Supreme Court [and] . . . circuit decisions have been mixed") (footnote omitted); *Bose Corp. v. Consumers Union, supra*, 508 F. Supp. at 1271 ("[N]o standards have been developed by the Supreme Court for use in determining whether a corporation is a public figure."); *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 486 (Minn. 1985) ("The proper application of the *Gertz* categories in cases involving corporate plaintiffs has never been addressed by the United States Supreme Court."); *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d 220, 228 (N.J. 1986) ("[T]he Supreme Court has yet to address whether corporations or their products can be classified as public figures."); B. Sanford, *Libel and Privacy* § 7.7, at 354.5 (2d ed. 1994) ("[T]he Supreme Court has yet to address squarely the constitutional status of defamation suits in which the plaintiff is not a human being."); R. Smolla, *Law of Defamation* § 2.24[6], at 2-86 (1994) ("The Supreme Court has yet to deal squarely with the application of the public figure test in a corporate plaintiff case."); K. Dotseth, Note, *Redefining the Corporate "Jellyfish": Corporate Plaintiffs in Defamation Actions*, 14 J. Corp. L. 907, 912 (1989) ("[N]either a majority of state courts nor the United States Supreme Court have addressed the issue of corporate public figure status . . . .").

Lack of guidance from this Court has resulted in conflict and confusion among both federal and state courts regarding the application of public figure status to corporations. Some courts have concluded that *Gertz* simply does not apply at all in the corporate defamation plaintiff context; others have purported to apply *Gertz* by concluding that there is no distinction between corporate and individual plaintiffs; still others implicitly combine these approaches by purporting to employ a *Gertz* analysis, all the while recognizing that a corporation is, in some relevant manner, distinguishable from a natural person.

Some courts have determined that the *Gertz* public figure/private figure distinction so ill-fits the corporate defamation plaintiff that an entirely different analysis is required to determine the applicability of the actual malice standard to corporations. *See, e.g., Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955-56 (D.D.C. 1976) (stating that "corporations must be excluded from the *Gertz* holding" because they do not possess the same requisite attributes as an individual, and applying an actual malice standard to corporate plaintiffs "where issues of legitimate public concern are discussed"); *Jadwin v. Minneapolis Star & Tribune Co., supra*, 367 N.W.2d at 487-88 (stating that "the reputational interests of these corporations is *de minimis* compared to the reputational interests of [an individual]," and holding that "corporate plaintiffs in defamation actions must prove actual malice by media defendants when the defendants establish that the defamatory material concerns matters of legitimate public interest in the geographic area in which the defamatory material is published").[4] The determinative factor whether a cor-

[4] *See generally* P. Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish*, 68 Iowa L. Rev. 35 (1982) (concluding that a corporation should be more susceptible to public figure status than a natural person, given its special characteristics and lesser vulnerability to reputational injury).

At least one libel text has concluded that the very fact that a corporation is publicly held is sufficient to invoke an actual malice standard

porate plaintiff in these jurisdictions must prove actual malice is whether the corporation's activities involve the public interest, rather than whether the corporation meets the *Gertz* public figure criteria.[5]

At the other extreme, some courts have held that there is no cognizable difference between a corporation and a natural person which would justify any greater protection for defamatory speech about corporate affairs. *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589-90 (1st Cir. 1980) (noting that a corporation's interest in protecting its reputation is as important as that of a natural person, and holding that corporations cannot be treated as a class for purposes of First Amendment public figure analysis); *Continental Cablevision, Inc. v. Storer Broadcasting Co.*, 653 F. Supp. 451, 460 (D. Mass. 1986) (holding that corporations and natural persons cannot be distinguished as a class); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 819 (N.D. Cal. 1977) (expressly rejecting *Martin Marietta, supra,* and holding that "for purposes of applying the First Amendment to defamation claims, the distinction between

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with respect to commentary about corporate affairs. *See* R. Sack & S. Baron, *Libel, Slander, and Related Problems, supra*, § 5.3.8, at 273:

> Decisions holding that any *publicly held* corporation is a public figure for purposes of commentary about its corporate affairs are persuasive. When a corporation "goes public" by publicly offering its securities, it has taken a specific, voluntary action, the known result of which will be mandatory, increased public scrutiny. The necessary consequence is publicity. (emphasis in original; footnote omitted)

[5] The New Jersey Supreme Court has held its state constitution's free speech provisions to extend the heightened protection of the actual malice test to speech about those "activities and products of corporations [which] constitute matters of public interest" precisely because "the term 'public figure' . . . ill fits a corporation." *Dairy Stores* v. *Sentinel Publishing, supra*, 516 A.2d at 227, 230; *see also Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 655 A.2d 417, 427 (N.J. 1995) (applying the actual malice test to defamatory communications about the consumer activities of businesses that are of "inherent public concern").

corporations and individuals is one without a difference"); *Vegod Corp. v. American Broadcasting Cos.*, 603 P.2d 14, 15 (Cal. 1979) (in bank) (noting that corporations are entitled to the same protection against defamatory speech as individuals, and holding that "[c]riticism of commercial conduct does not deserve the special attention of the actual malice test"), *cert. denied*, 449 U.S. 886 (1980) .

Other courts have struck a middle course, asserting that they were adhering to a *Gertz* public/private figure analysis in the corporate plaintiff context, but nonetheless distinguishing between corporate defamation plaintiffs and natural persons. Because there have been no established standards for determining when a corporate defamation plaintiff is a public figure, these courts have engaged in what is essentially an *ad hoc* determination of public figure status. Often, there is no way to reconcile results across—or even within—jurisdictions, or to determine what factors a court has deemed relevant in its public figure inquiry.

For example, there is a clear split among jurisdictions about whether a corporation's involvement in a highly regulated industry (such as Cyanamid's involvement in the pharmaceutical industry) is germane to a public figure analysis. Some courts have concluded that a corporation invites public scrutiny about its corporate affairs by entering into a highly regulated industry. *See, e.g., Silvester v. American Broadcasting Cos.*, 839 F.2d 1491, 1497 (11th Cir. 1988) (corporate (and individual) libel plaintiffs held public figures because they "thrust themselves into [a] position of prominence by voluntarily entering a strictly regulated, high-profile industry in which there were few major participants," thus "invit[ing] public scrutiny, discussions, and criticism"); *Beech Aircraft Corp. v. National Aviation Underwriters*, 11 Media L. Rep. (BNA) 1401, 1411 (D. Kan. 1984) (aircraft manufacturer held a public figure in part because of its involvement in a highly regulated industry); *Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341, 1349 (S.D.N.Y. 1977) ("the public interest in

maintaining the free marketplace of ideas must outweigh plaintiff's claim to the sanctity of private status" when reporting concerns the financial transactions of a large, heavily regulated corporation); *American Benefit Life Insurance Co. v. McIntyre*, 375 So. 2d 239, 242 (Ala. 1979) (per curiam) (insurance industry has long been "clothed with the public interest . . . and the power and influence of such a business over society cannot be ignored"; "a corporation whose dealings are subject to close regulation by our state government, and, indeed, whose very existence as an entity is owing to that government" is a public figure); *Coronado Credit Union v. KOAT Television, Inc.*, 656 P.2d 896, 904 (N.M. Ct. App. 1982) (credit union held a public figure in part because it was involved in a comprehensively regulated industry which "involved matters of public concern").[6]

Other courts, including the Fourth Circuit, have all but totally dismissed the highly regulated nature of a corporate defamation plaintiff's industry as a basis for determining public figure status. *See, e.g., Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 689 (4th Cir. 1989) (holding that bank is not a public figure and noting that "regulated businesses should be treated no differently from other members of the community"); *Bank of Oregon v. Independent News, Inc.*, 693 P.2d 35, 42 (Or.) (expressly rejecting the analysis in *Coronado, supra*, "in favor of a stricter application of the *Gertz* standard" and declining to hold that a bank is a public figure even though banking is a pervasively regulated business), *cert. denied*, 474 U.S. 826 (1985).

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[6] These courts implicitly intermingle certain aspects of a public interest analysis with the *Gertz* public figure test, by holding that a corporate plaintiff is a public figure because it is involved in an industry imbued with the public interest. *See* R. Smolla, *Law of Defamation, supra*, § 2.24[6], at 2-86 to 2-87 ("[C]orporations engaging in highly regulated activities, or subjected to special scrutiny or investigation by official agencies, or engaged in unusually aggressive or controversial advertising, are more likely to be deemed public figures.") (collecting cases).

A similar split exists as to whether extensive advertising (such as that engaged in by Cyanamid) has bearing on the public figure status of a corporate plaintiff. *Compare, e.g., Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980) (advertising held to have invited public attention and comment and constituted a voluntary injection into a "matter of public interest") *with Golden Bear Distributing Systems, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 952 (5th Cir. 1983) (holding that the fact of advertising does not render a business a public figure.)

As things now stand, both federal and state courts are in the process of rendering inconsistent, conflicting and inevitably unpredictable decisions about a matter as to which guidance from this Court is sorely needed. In the words of one commentator, "[T]he Supreme Court needs to reenter the area of the first amendment defamation privilege to clarify how the public figure/private figure test is to be applied" to corporations. J. Hilbert, Comment, *A Criticism of the Gertz Public Figure/Private Figure Test in the Context of the Corporate Defamation Plaintiff*, 18 San Diego L. Rev. 721, 742 (1981). We urge the Court to do so in this case involving a ruling that one of this country's largest corporations is a private figure.

II. THE HOLDING THAT AMERICAN CYANAMID IS NOT A PUBLIC FIGURE IS IN CONFLICT WITH *GERTZ V. ROBERT WELCH, INC.*

A. American Cyanamid is an All-Purpose Public Figure

At the heart of this Court's decision in *Gertz* is the notion that commentary on and criticism of those who "have assumed roles of especial prominence in the affairs of society" should be encouraged. "Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention," this Court observed, "may recover for injury for reputation only on clear and con-

vincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz, supra*, 418 U.S. at 342.

American Cyanamid is one of the nation's largest corporations. Its annual report trumpets not only its $3.405 billion in total assets and $3.536 billion in net sales, but its 56,790 stockholders and 36,432 employees. "We are," the company proclaims:

> – a leader in pesticides and animal products with strong new product entries.
>
> – one of the fastest-growing pharmaceutical companies in the world.
>
> – one of the top two biological houses in the United States.
>
> – the number one adult multi-vitamin company in the United States and a leader in medical over-the-counter products.
>
> – a leading producer of lower-priced generic pharmaceuticals.
>
> – a leader in aerospace adhesives, polyacrylamides, coating resins and paper chemicals.
>
> – the leader in liquid cleaners in the United States, and we have strong brand names in toiletries and fragrances.[7]

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[7] The quotations are from Cyanamid's 1985 Annual Report which was admitted in evidence. J.A. 3167-3214. In 1985, *Fortune* magazine ranked Cyanamid as the 109th largest U.S. industrial corporation in the country. *Fortune 500*, Fortune, Apr. 28, 1986, at 186-87. In 1990, the year Cyanamid claims it was first defamed by petitioners, it reported sales of $3.4 billion, assets of $4.7 billion and combined selling, advertising, administrative and general expenses of over $1.2 billion. Proxy Statement filed with Securities and Exchange Commission, Dec. 15, 1994, at 10. On or about December 30, 1994, Cyanamid was acquired by American Home Products Corporation for over $9.5 billion. Proxy Statement, *supra*, at 7.

Given its size, its prominence and its corporate power, it is inexplicable why Cyanamid was not held to possess "such pervasive fame or notoriety that [it] becomes a public figure for all purposes and in all contexts." *Gertz*, *supra*, 418 U.S. at 351. The decision finding that Cyanamid is a private figure simply cannot be reconciled with the facts concerning its role in American corporate life, its sheer size and concomitant influence both generally and with respect to the chemical, pharmaceutical, medical, agricultural and other fields of enterprise in which it engages, the extent to which it promotes itself and its products to the public, and its access to the media. Nor can such a finding be reconciled with the conclusions of courts in other jurisdictions with respect to the public status of corporations on far less compelling facts.[8]

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[8] *See, e.g., Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341, 1348 (plaintiff corporation less than one-third the size of Cyanamid held an all-purpose public figure); *American Benefit Life Insurance Co. v. McIntyre*, *supra*, 375 So. 2d at 242 (insurance corporation subject to close regulation held an all-purpose public figure); *WTSP-TV, Inc. v. Vick*, 11 Media L. Rep. (BNA) 1543, 1544 (Fla. Cir. Ct.) (plaintiff television station subject to "the continuous scrutiny and licensing of a public agency" held an all-purpose public figure), *appeal dismissed*, 475 So.2d 703 (Fla. Ct. App. 1985); *Ithaca College v. Yale Daily News Publishing Co.*, 433 N.Y.S.2d 530, 533-34 (Sup. Ct. 1980) (small and private educational corporation held a public figure for all purposes due to the "public aspects of its formation, character and conduct"), *aff'd*, 445 N.Y.S.2d 621 (App. Div. 1981); *American Family Mutual Insurance Co. v. Edgar*, 23 Media L. Rep. (BNA) 1555, 1556-57 (Wis. Cir. Ct. 1995) (large insurance corporation seeking redress for defamatory speech held a general-purpose public figure). Other courts have engaged in all-purpose figure type analysis and arrived at similar determinations without expressly stating that the corporate plaintiffs in those cases were all-purpose public figures. *See, e.g., Beech Aircraft v. National Aviation Underwriters*, *supra*, 11 Media L. Rep. (BNA) at 1410-11 (aircraft manufacturer held a "public figure" in part due to its size and regulated nature of the industry); *Coronado Credit Union v. KOAT Television*, *supra*, 656 P.2d at 903-04 (corporate credit union held a "public figure" in part due to its size and regulated nature of the industry).

In contrast to the Fourth Circuit's constricted public figure analysis, the Fifth Circuit has articulated a test to determine the public figure status of a corporate defamation plaintiff under which Cyanamid would qualify as an all-purpose public figure. In *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325 (5th Cir. 1993), *cert. dismissed*, 114 S. Ct. 1587 (1994), the Fifth Circuit held that in determining whether a corporation is an all-purpose public figure, a court should should examine: (i) the "notoriety of the corporation to the average individual in the relevant geographical area"; (ii) "the nature of the corporation's business"; and (iii) "the frequency and intensity of media scrutiny that a corporation normally receives." 998 F.2d at 1329-30.[9]

In view of its enormous size, notoriety and access to the media, coupled with its involvement in one of the most highly regulated industries in the country, Cyanamid satisfies the test for all-purpose public figures enunciated in the Fifth Circuit and in other jurisdictions. There can be no doubt that the company *would* have been found an all-purpose public figure in these jurisdictions.

In fact, Cyanamid is plainly more powerful, influential, and visible than many individuals whom the courts have found to be all-purpose public figures. *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154-55 (1967) (well-known college football coach); *Ryan v. Brooks*, 634 F.2d 726, 728 n.2 (4th Cir. 1980) (vice president and general manager of Southern

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[9] This test has been adopted in the District of Hawaii. *See Kroll Associates v. City of Honolulu, supra*, 833 F. Supp. at 805. Other jurisdictions as well have adopted substantially the same test for determining corporate plaintiff all-purpose public figure status. *See Beech Aircraft v. National Aviation Underwriters, supra*, 11 Media L. Rep. (BNA) at 1410-11 (all-purpose public figure factors include corporate sales and assets, regulated nature of the industry, and extent of regular media exposure); *American Family Mutual Insurance Co. v. Edgar, supra*, 23 Media L. Rep. (BNA) at 1556-57 (all-purpose public figure factors include corporate size and prominence in its industry, the regulated nature of the industry, and corporate name recognition).

Bell Telephone Co. for North Carolina operations); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir.), (secretary-treasurer of the Teamsters union), *supplemented*, 628 F.2d 932 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 1041 (1981). It makes little sense to apply the "actual malice" standard to football coaches, telephone company executives and union officials and not apply it to a multi-billion dollar, publicly held corporation. Indeed, Cyanamid is at the polar extreme of what should be considered a corporate all-purpose public figure. If Wally Butts, John Ryan and Dusty Miller have "especial prominence in the affairs of society" with respect to commentary about their conduct, so too must General Motors, I.B.M.—and American Cyanamid. Under *Gertz*, the Court of Appeals should have held American Cyanamid to be an all-purpose public figure as a matter of law.

B. Alternatively, in the Context of the Instant Controversy, American Cyanamid is a Limited-Purpose Public Figure

Even if one were to accept the proposition that a publicly held, pervasively regulated, intensely scrutinized corporation of Cyanamid's enormous size and influence has *any* "private" reputation in the sense intended by *Gertz*, the Fourth Circuit's holding that Cyanamid is a private figure for purposes of the speech at issue here cannot be sustained. Indeed, the decision below is illustrative of the perverse results that follow when courts lose sight of the essential concerns of *Gertz* and attempt to shoehorn corporate defamation plaintiffs into analytic categories which simply do not take account of the ways in which such plaintiffs may have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them," *Gertz*, *supra*, 418 U.S. at 345.[10]

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[10] *See, e.g., Blue Ridge Bank v. Veribanc, supra*, 866 F.2d at 687-89 (heavily regulated bank prominent in its county of residence that had recently converted from S&L status, had extensively promoted itself, and had demonstrated access to media was not limited-purpose public figure in context of erroneous report that it was at risk of insolvency because

In its decision below, the Fourth Circuit narrowed the inquiry into limited public figure status to a two-part test under which, "[f]irst, a 'public controversy' must exist giving rise to the alleged defamation" and "[s]econd, the nature and extent of the plaintiff's participation in that controversy must be sufficient to justify 'public figure' status." (App. 6a) The court's conclusion that Cyanamid was a private figure was grounded solely in its finding that no public controversy existed because the allegedly defamatory statements arose from "a purely private contractual dispute . . . [and] dealt only with the adequacy of Cyanamid's marketing efforts; they did not deal with any issues that could potentially affect the public." (App. 7a) Moreover, the court stated, "the subject of dispute (the adequacy of Cyanamid's marketing efforts) was not a part of Cyanamid's promotional message." *Id.*

The Fourth Circuit's approach thus construes a corporate defamation plaintiff to be a private figure under *Gertz* regardless of the degree to which the corporation has set the stage for adverse comment about its conduct through voluntary actions which placed it in the public spotlight with respect to its conduct—*unless*, that is, the allegedly defamatory statements are explicitly and precisely addressed to the very promotional message the corporation has chosen to send about itself to the public. This approach not only wholly abandons *Gertz*'s command that a plaintiff's access to the media and assumption of the increased risk of defamatory criticism be taken into account on the question of public figure status, but also improperly constricts the definition of "public controversy" for purposes of the limited public figure analysis.

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there was no "specific pre-existing controversy" regarding bank's financial health); *U.S. Healthcare, Inc. v. Blue Cross*, 898 F.2d 914, 937-39 (3d Cir.) (two large health insurance providers who engaged in advertising war centering on the relative merits of health maintenance organizations and traditional insurance, who had ample access to the media, and who had invited public comment and assumed the risk of unfair comment were not limited-purpose public figures under *Gertz* in context of mutual defamation suits because the allegedly defamatory speech was commercial), *cert. denied*, 498 U.S. 816 (1990).

The record in this case demonstrates beyond dispute the high level of public interest in and attention to the conduct of Cyanamid and Mylan with regard to the very contract at issue here: the very fact of repeated reportage about it in the *New York Times* and other publications itself demonstrates that Cyanamid's alleged breach of contract as to the marketing of Maxzide® is hardly an exclusively "private" matter.

Beyond that, public controversies had long existed with respect to the relative merits of various hypertension medications in general and the merits and marketing of Maxzide® in particular into which Cyanamid directly and aggressively thrust itself. *See, e.g.*, Tr. at 2610-2834. In marketing Maxzide®, Cyanamid maintained in the district court, hundreds of sales representatives of Cyanamid's Lederle division pressed on physicians, among many other promotional items, a brochure whose cover prominently featured the following quote from the November 9, 1984, *Wall Street Journal*: "CLAIMS ABOUT MAXZIDE ARE EXPECTED TO PROMPT MORE DEBATE AMONG PHYSICIANS OVER WHETHER TO CONTINUE PRESCRIBING DYAZIDE";[11] another entitled "The Beta Blocker v. Diuretic Controversy";[12] yet another containing highlights of a international cardiac

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[11] Waldholz, *Mylan Labs Unveils Dyazide-Like Drug for Blood Pressure*, Wall St. J., Nov. 9, 1984, at 7, col. 1; J.A. 2643. Dyazide® was Maxzide®'s chief competitor in the diuretic class of hypertension drugs and, at the time Maxzide® was launched by Cyanamid, was the number one selling hypertension medication in the United States. Tr. 2629. One of Cyanamid's witnesses, in explaining the company's (unrealized) hope that the FDA would take the unusual step of publicly endorsing Maxzide®, stated:

> [The FDA doesn't] usually do that, but in this situation, it was such an unusual product development story and . . . there was the possibility that they would . . . go public because I know that FDA . . . wanted alternatives to Dyazide.

Tr. 2990.

[12] J.A. 2509.

care symposium, which favorably compared Maxzide® to Diazide® and was introduced with the headline "Is Your Patient at Risk of Sudden Death?";[13] reprints of a medical journal article entitled "Essential Hypertension: New Insights and Controversies in Treatment with Diuretics";[14] and letters calling attention to a Congressional investigation of a scandal involving submission of false data to the FDA by generic drug makers and the subsequent recall of a number of generic drugs, including generic versions of Maxzide®.[15] Cyanamid, in addition, published press releases concerning its marketing of Maxzide®, distributed booklets on the benefits of Maxzide®, and sponsored a three-part cable television network program about hypertension which stressed that diuretic medications (such as Maxzide®) were more effective in reducing deaths from heart attack and stroke than alternative drug therapies.[16] Cyanamid also argued in the district court that it had developed an extensive advertising campaign aimed not only at physicians but also directly at consumers in order to "drive thousands of patients into doctors' offices equipped with product knowledge of MAXZIDE [and] create brand loyalty" among patients themselves.[17]

Cyanamid argued to the district court in its defense, as well, that it had promoted Maxzide® with "virtually unprecedented

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[13] Tr. 2674, Def. Ex. 585.

[14] Tr. 2671-72.

[15] J.A. 1808-11. A Cyanamid representative testified at trial that the purpose of the letters "was to make the most of the generic drug scandal . . . to reassure doctors if they would specify the Maxzide brand, . . . then the patient would not be switched to a generic that they might not be able to rely on." Tr. 2803; J.A. 1809. A similar letter was sent by Cyanamid's Lederle division to pharmacists, Tr. 2803, which stated, "Unlike certain generics, Lederle's MAXZIDE has not been recalled and, as always, is immediately available for your use." Def. Ex. 675.

[16] J.A. 2509 (press release); J.A. 1820-21 (patient booklets); Tr. 3052, J.A. 2866 (television program).

[17] J.A. 3005.

intensity" and used "a broad spectrum of media to create product awareness and name recognition [and] to educate the medical community as to the pharmacological features of the new drug." Cyanamid claimed to have engaged in "intense selling efforts . . . to insure well-stocked pharmacy shelves ready to fill prescriptions written as a result of Cyanamid's promotional efforts" and "sustained aggressive marketing and promotional efforts, using a variety of techniques." (App. 46a, quoting Cyanamid's Statement of Facts to be Proved at Trial) Cyanamid also boasted that Maxzide® was a commercial success, "prescribed by tens of thousands of doctors for use by hundreds of thousands of patients, described in [medical and pharmaceutical] textbooks as well as drug evaluations published by the American Medical Association and other institutions."[18] (App. 46a)

The district court also determined from the record that Cyanamid had "considerable access to the general and financial media, including . . . the media involved in covering the pharmaceutical industry." (App. 43a) Finally, each statement at issue here, if made at all by petitioners (a factual matter that has not been determined as to all of the complained-of statements), was made in response to questions initiated by either members of the press or drug industry financial analysts. The Mylan-Cyanamid dispute over Maxzide®'s promotion and marketing was plainly one of importance to a public extending far beyond the parties to this suit. (App. 36a-40a; J.A. 317-25)[19]

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[18] According to Cyanamid, net sales of Maxzide® through 1991 totalled more than $376 million. *See* Amended Answer and Counterclaims ¶¶ 25, 26, 46.

[19] Such facts distinguish this case from *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), where this Court, without reaching the public/private figure issue, held that publication of a false credit report about a small local construction company "to only five subscribers who, under the terms of the subscription agreement, could not disseminate it" was not protected by the constitutional malice standard

Given these and other evidences of pre-existing public concern about and controversies regarding hypertension drugs, of Cyanamid's deliberate actions to fan the controversies in order to promote Maxzide® sales, and of Cyanamid's particular efforts to persuade both the medical community and general public of the effectiveness, reliability, and wide and continued availability of Maxzide®, the Fourth Circuit's conclusion that there was an insufficient nexus between any controversy of public moment and the alleged defamations to warrant limited public figure status for Cyanamid here simply cannot be credited.

First, the statements at issue directly concerned Cyanamid's conduct in marketing and promoting Maxzide®—the very marketing and promotion as to which and through which Cyanamid vigorously, successfully and in every sense *publicly* drew attention to and fostered public reliance on itself. This alone is enough to satisfy the *Gertz* standard that limited public figures are those which "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, *supra*, 418 U.S. at 345; *see Silvester v. American Broadcasting Cos.*, *supra*, 839 F.2d at 1497 (Corporate and individual libel plaintiffs were limited purpose public figures because they "initially thrust themselves into [a] position of prominence by voluntarily entering a strictly regulated, high-profile industry in which there were few major participants. By becoming

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because no matter of public concern was implicated by the speech. 472 U.S. at 761-62 (plurality opinion). *Dun & Bradstreet* is noteworthy, as well, for the unanimity apparently exhibited on the Court as to whether equivalent First Amendment protections are granted to media and non-media libel defendants. Professor Smolla appears correct that "all the Justices in *Dun & Bradstreet* either explicitly or implicitly rejected the media/non-media distinction." R. Smolla, *Law of Defamation*, *supra*, § 3.02[2], at 3-9 to 3-10. What is undeniable is that at least five justices explicitly did so. *See* 472 U.S. at 773 (White, J., concurring); 472 U.S. at 781-84 (Brennan, J., dissenting, in an opinion joined by Marshall, J., Blackmun, J., and Stevens, J.).

important members of the regulated . . . industry, they invited public scrutiny, discussions, and criticism.").

Second, in defining the only relevant controversy here as "a purely private contractual dispute" between Mylan and Cyanamid, the Fourth Circuit decision also conflicts with the weight of legal authority concerning how closely an alleged defamation must relate to a particular public controversy in order to justify limited public figure status.[20] Cases generally require no more than that the allegedly libelous statement not be "wholly unrelated" to an ongoing public controversy. *See Tavoulareas v. Piro*, 817 F.2d 762, 774 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1298 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); *accord Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 620 (2d Cir.) (controversy surrounding individual plaintiffs' status as Roman Catholic clergy made them and their non-profit corporation public figures for purposes of

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[20] We do not suggest that the Fourth Circuit was alone in its approach. Some other courts have also adopted overly restrictive approaches to the "public controversy" prong of the limited-purpose public figure inquiry as to corporate defamation plaintiffs. *See, e.g., Vegod Corp., supra*, 603 P.2d at 15, 17-18 (corporations that conducted "close-out sale" for landmark department store, heavily advertising the bargains available at the sale, not a limited public figure for purposes of comment about quality and value of merchandise they offered because no public controversy existed); *Bank of Oregon, supra*, 693 P.2d at 37, 42 (bank was not a limited-purpose public figure in context of article reporting charges that it had "engaged in numerous wrongful acts to divert [a customer's] money and credit to another . . . customer" because no public controversy pre-existed the article); *see also, e.g., Dodrill v. Arkansas Democrat Co.*, 590 S.W.2d 840, 844 (Ark. 1979) (en banc) (attorney suspended from law practice for a year because of unethical conduct whose reinstatement was conditioned on subsequently passing state bar exam was not a public figure for purposes of statement that he had failed that exam, despite the litigation and publicity surrounding his suspension, because no public controversy existed as to his bar exam score), *cert. denied*, 444 U.S. 1076 (1980). The existence of these cases—wrongly decided, we submit, and inconsistent with *Gertz* itself—is itself a powerful reason for this Court to grant the writ and to review this case.

statements that the corporation had been charged with business fraud), *cert. denied*, 488 U.S. 856 (1988); *Marcone v. Penthouse International Magazine For Men*, 754 F.2d 1072, 1082-86 (3d Cir.) (illegal drug trafficking in general was the relevant public controversy for purposes of determining libel plaintiff's public figure status with respect to report implying that he had been convicted of drug dealing charges which had in fact been dismissed), *cert. denied*, 474 U.S. 864 (1985).[21]

When a large, publicly held corporation such as Cyanamid has taken the initiative to throw its massive resources and enormous influence behind the marketing and promotion of a highly-regulated product important to the welfare of hundreds of thousands of people and subject to wide debate and discussion within the medical, pharmaceutical and investment communities, it cannot reasonably be said that speech critical of the marketing and promotion of the product is "purely private" and "d[oes] not deal with any issue that could potentially affect the public"—or that the corporation is a "private figure" as to such speech. Review by this Court is necessary to prevent the kind of misconstruction of *Gertz*'s "public controversy" standard that leads, as it did in the Fourth Circuit here, to a result so at odds with both the letter and spirit of *Gertz*.

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[21] *And see Steaks Unlimited v. Deaner*, *supra*, 623 F.2d at 273-74 (meat producing company that engaged in intensive advertising campaign through various media was limited public figure with respect to criticism of its advertising and sales practices because it had "voluntarily injected itself into a matter of public interest—indeed, it appears to have created a controversy—for the purpose of influencing the consuming public"); *FoodScience Corp. v. McGraw-Hill, Inc.*, 592 F. Supp. 362, 364-65 (D. Vt. 1984) (corporate defamation plaintiff which manufactured, distributed and promoted through the media a purported "miracle vitamin" was limited public figure for purposes of allegedly defamatory article concerning, *inter alia*, corporation's possible links to organized crime); *Bose Corp. v. Consumers Union*, *supra*, 508 F. Supp. at 1273 (manufacturer of stereo speaker system was limited public figure in part because its own extensive promotional campaign had created a controversy by touting the system's superiority over competing products; the "extent of the plaintiff's advertising alone might very well justify a holding that the plaintiff is a public figure").

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
May 26, 1995

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1472

MYLAN PHARMACEUTICALS, INCORPORATED,
a West Virginia Corporation,

Plaintiff-Appellee,

—v.—

AMERICAN CYANAMID COMPANY,
a Maine Corporation,

Defendant & Third-Party
Plaintiff-Appellant,

—v.—

STEPHEN MCKNIGHT, Personal Representative
of the Estate of Roy McKnight,

Third Party Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of West Virginia, at Clarksburg.
Frederick P. Stamp, Jr., District Judge.
(CA-90-121-C-S)

Argued: October 31, 1994 Decided: March 3, 1995

Before:

WILKINS and MICHAEL, *Circuit Judges,*
and PHILLIPS, *Senior Circuit Judge.*

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Rodney Orrin Thorson, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Washington, D.C., for Appellant. Andrew G. Fusco, FUSCO & NEWBRAUGH, Morgantown, West Virginia, for Appellees. ON BRIEF: Mark E. Herlihy, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Washington, D.C.; James F. Companion, SCHRADER, RECHT, BYRD, COMPANION & GURLEY, Wheeling, West Virginia, for Appellant. Thomas H. Newbraugh, Jeffrey A. Ray, FUSCO & NEWBRAUGH, Morgantown, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

This case arises out of a dispute between Mylan Pharmaceuticals, Inc. (Mylan) and American Cyanamid Co. (Cyanamid) over the marketing of Maxzide[RM], a drug for the treatment of hypertension. Mylan sued Cyanamid on five counts, including breach of contract and breach of the implied covenant of good faith. Cyanamid brought four counterclaims, including a claim for defamation. Neither party recovered on any of its claims. The district court granted judgment as a matter of law on several claims, and the jury denied relief on the remainder. Cyanamid now appeals, and Mylan cross

appeals. We affirm on all but one issue. With respect to Cyanamid's defamation counterclaim, the district court erred in determining that Cyanamid was a limited purpose public figure. We therefore affirm in part, vacate in part, and remand for additional proceedings.

I.

Mylan developed Maxzide in the early 1980's as a more effective alternative to existing hypertension drugs. Maxzide was produced by a process called "parallel granulation," over which Mylan eventually received a patent. Because Mylan lacked the resources and experience to market Maxzide on a massive scale, it entered into an exclusive marketing agreement with Lederle Laboratories, a division of American Cyanamid.

Under the agreement Lederle agreed to purchase annually at least a specified minimum quantity of Maxzide at a specified price and to use its "best efforts consistent with its overall business objectives and commensurate with products of like nature and market potential, to advertise, promote, and market" Maxzide. The agreement was to last seventeen years, the length of Mylan's patent protection on the parallel granulation process. Lederle launched the product later that year, and it met with initial success.

This success, however, was short-lived. In 1987, several low priced generic substitutes entered the market. These products were as effective as Maxzide, but were produced by methods other than parallel granulation to avoid infringing Mylan's patent. Mylan brought lawsuits against the first few manufacturers but eventually settled. The presence of these generics in the market place reduced Maxzide's sales volume.

In 1988, Mylan introduced a lower strength version of Maxzide ("Maxzide-25"). Mylan and Lederle modified their earlier contract by means of a letter signed by Robert Saydah (vice president and general manager of Lederle) and Milan Puskar (president of Mylan). The letter, referred to by the par-

ties as the "Saydah Agreement", revised the original contract's pricing scheme and provided for Lederle's marketing of Maxzide-25.

In response to the onset of generic competition, Lederle decreased the resources that it devoted to marketing Maxzide. Mylan became dissatisfied with Lederle's performance and sued, claiming that Cyanamid had breached the best efforts clause of their contract. At about the same time Mylan's president and vice president stated publicly that Cyanamid was not living up to its part of the bargain.

Mylan's amended complaint made five claims against Cyanamid. First, it claimed that Cyanamid was improperly calculating its "net sales" for Maxzide, reducing the payments made to Mylan under the Saydah Agreement (Count I). Second, it claimed that Cyanamid had breached the "best efforts" provision of the agreement with respect to both Maxzide and Maxzide-25 (Counts II and III). Third, it claimed that Cyanamid had breached the implied covenant of good faith and fair dealing (Count IV). Finally, it claimed that Cyanamid failed to purchase the minimum quantity of Maxzide-25 required under the Saydah Agreement (Count V).

Cyanamid, in response, brought four counterclaims. First, it claimed that Mylan had fraudulently induced it to enter the agreement by misrepresenting the ability of its patent to stop generic competition (First Counterclaim). Second, it alleged that Mylan breached its contractual duty to protect Maxzide from generic competition (Second Counterclaim). Third, it claimed that Mylan and its chairman had defamed it (Third Counterclaim). Finally, it claimed that Mylan breached the contract by failing to obtain FDA-approved labeling (Fourth Counterclaim).

The district court disposed of several of these claims before trial, granting summary judgment for Cyanamid on Mylan's Counts I and V and for Mylan on Cyanamid's Third Counterclaim. At the close of the evidence the court granted judgment as a matter of law for Cyanamid on Mylan's Count IV. The jury returned a verdict on the remaining claims, denying

relief on all of them. Cyanamid now appeals and Mylan cross appeals.

II.

A. *Defamation counterclaim*

Cyanamid first claims that the district court erred in granting summary judgment for Mylan on Cyanamid's defamation counterclaim. Cyanamid based its counterclaim on the following statements by Patricia Sunseri (Mylan's vice president) and Steven McKnight (Mylan's president): (1) Sunseri's statement that Maxzide "languished while Lederle's sales force pushed other products," (2) McKnight's statement that "Lederle literally is not living up to their contract," (3) McKnight's statements that orders from Lederle were "nonexistent" and that Lederle was "digging its hole deeper and deeper," and (4) Sunseri's statement that Cyanamid responded to Mylan's lawsuit by cutting off all orders of Maxzide. The district court held that Cyanamid was a limited purpose public figure for the purposes of the above statements and that Cyanamid failed to show the requisite "actual malice" to hold Mylan liable for defamation.

The First Amendment provides less protection to a defamation plaintiff when that plaintiff is a public official or public figure rather than a private individual. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), the Supreme Court held that a public official may recover for a defamatory falsehood only if he can show that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard for its truth or falsity. The Court later extended this standard to "public figures" as well as public officials. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162-65 (1967).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held that a person could be considered a public figure for a limited range of issues by voluntarily injecting himself into a particular public controversy. Such a "limited purpose

public figure" must show actual malice to recover for a defamatory statement relating to that controversy.

Here, the district court determined that Cyanamid became a limited purpose public figure by virtue of its launch and promotion of Maxzide, which were of "virtually unprecedented intensity." By voluntarily putting itself into the public eye, the court concluded, Cyanamid became a limited purpose public figure with regard to the controversy about its marketing of Maxzide.

We recently set out a two-part test for determining whether a defamation plaintiff is a limited purpose public figure. *See Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994). First, a "public controversy" must exist giving rise to the alleged defamation. Second, the nature and extent of the plaintiff's participation in that controversy must be sufficient to justify "public figure" status. *Id.* at 1553. We find that no public controversy exists here and that the district court erred in determining that Cyanamid is a limited purpose public figure.

In *Foretich* we adopted the District of Columbia Circuit's definition of "public controversy" as "a real dispute, the outcome of which affects the general public or some segment or it in an appreciable way." *Id.* at 1554 (quoting *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 449 US. 898 (1980)). We noted that "[e]ssentially private concerns or disagreements do not become public controversies simply because they attract attention." *Id.*

We considered the same issue in two cases prior to *Foretich*. In *National Found. for Cancer Research (NFCR) v. Council of Better Business Bureaus*, 705 F.2d 98 (4th Cir.), *cert. denied*, 464 U.S. 830 (1983), the Council for Better Business Bureaus published a statement regarding the percentage of the NFCR's total income that was spent on program services. We decided that the NFCR was a limited purpose public figure for the purpose of this statement by virtue of its massive solicitation efforts, through which it "extolled its judicious use of donated funds in finding a cure for cancer." *Id.* at 101. In *Blue Ridge Bank v. Veribanc, Inc.*,

866 F.2d 681 (4th Cir. 1989), we held that a bank was not a limited purpose public figure for the purpose of a statement regarding its "corporate financial health." While the bank had engaged in an extensive promotional campaign, it had never raised its financial health as part of its promotional message. *Id.* at 687.

No public controversy exists in the present case. The conflict between Mylan and Cyanamid is a purely private contractual dispute about whether Cyanamid used its best efforts to market Maxzide. The allegedly defamatory statements dealt only with the adequacy of Cyanamid's marketing efforts; they did not deal with any issues that could potentially affect the public, such as Maxzide's effectiveness or whether Maxzide would continue to be distributed. The general public will not be affected by the outcome of this dispute.

This case is distinguishable from *NFCR*. In that case, NFCR's claim of judicious use of donated funds was part of the message of its solicitation campaign. Here, as in *Blue Ridge Bank*, the subject of dispute (the adequacy of Cyanamid's marketing efforts) was not part of Cyanamid's promotional message. Therefore, we conclude that the district court erred in finding that Cyanamid was a limited purpose public figure, and it thus erred in requiring Cyanamid to establish actual malice to maintain its claim of defamation. We vacate this finding and reinstate this counterclaim for additional proceedings under the standard applicable to a private individual.

B. *Evidentiary rulings*

Cyanamid claims that the district court erroneously admitted several pieces of evidence that prejudiced Cyanamid at trial. First, the court admitted letters from Milan Puskar (Mylan's president) to Cyanamid, in which Puskar expressed his opinion that Cyanamid was failing to meet its contractual obligations. Second, the court admitted a Lederle internal memorandum regarding complaints by Mylan prior to the lawsuit and deposition testimony by the memorandum's author explaining the memorandum. Third, the court admit-

ted testimony from Puskar about his frustration with the deteriorating relationship between the parties. Finally, the court admitted a copy of Cyanamid's 1991 Marketing Plan from which Mylan alleged Cyanamid had intentionally omitted pages. Much of this evidence was initially admitted to support the claim of bad faith, which was later disposed of as a matter of law.

We are satisfied that any error with respect to each of these items of evidence would be harmless. Any prejudice caused by each item would have been primarily with respect to the claims for breach of the best efforts provision—claims that were decided in Cyanamid's favor. At any rate, the prejudice would have been minimal in the context of a trial lasting well over a month and involving hundreds of pieces of documentary evidence. With regard to the letters in particular, the judge took steps to minimize their prejudice, including removing portions relevant only to the claim of bad faith and giving a limiting instruction that the letters should not themselves be regarded as proof of a claim. Therefore, Cyanamid suffered no substantial prejudice, and these rulings do not constitute reversible error. Fed. R Evid. 103(a).

C. *Effect of admission*

Cyanamid's final assertion of error is that the district court's jury instructions failed to give proper effect to admissions in Mylan's pleadings. In its reply to Cyanamid's counterclaims, Mylan admitted that it owed the following duties to Cyanamid: (1) to defend its Maxzide patents against challenges, (2) to defend the protection from competition afforded by its patents, and (3) to defend its FDA approval for Maxzide and the protection afforded by that approval. The court ultimately instructed the jury only that "Cyanamid claim[ed] that Mylan made" these promises. It continued that if the jury found that Mylan failed to perform one of the "alleged" promises, then its verdict "may" be for Cyanamid. If it did not find that Mylan had violated a promise, then its verdict "may" be for Mylan. Cyanamid alleges that this

instruction failed to give the proper conclusive effect to Mylan's admissions.

When reviewing a jury instruction we must examine the instructions as a whole and in the context of the entire case. *Hunnicutt v. Wright*, 986 F.2d 119, 122 (5th Cir. 1993); *see also Hogg's Oyster Co. v. United States*, 676 F.2d 1015, 1019 (4th Cir. 1982) (must view instructions as a whole). Viewing the instructions in context, we are satisfied that Cyanamid was not substantially prejudiced. While the district court described the above duties as "alleged," Mylan officials and other witnesses freely admitted at trial that Mylan owed Cyanamid these duties. No serious factual dispute existed in this regard. The court properly instructed the jury to rule in favor of Cyanamid if it found a breach or in favor of Mylan if no breach occurred. Therefore, we find that any error in the court's instructions was harmless.

D. *Implied covenant of good faith*

Mylan claims that the district court erred in granting judgment as a matter of law on its claim for breach of the implied covenant of good faith and fair dealing. At trial Mylan based its claim on two alleged misrepresentations by Cyanamid. First, Mylan claims that Cyanamid enticed it to enter into an exclusive marketing agreement by misrepresenting its plan to market Maxzide-25 at a 1988 slide presentation. Second, Mylan contends that Cyanamid intentionally omitted fifteen pages from the 1991 Maxzide marketing plan that it gave Mylan. These pages, Mylan maintains, would have shown Cyanamid's intent to deemphasize Maxzide in favor of other drugs.

At the close of Mylan's case in chief, Cyanamid moved for judgment as a matter of law on this claim, asserting that the claim lacked a legally sufficient evidentiary basis and that an implied covenant of good faith would be coextensive with the contract's express best efforts provision. The district court denied the motion on the former grounds, finding that sufficient evidence existed for a reasonable jury to find bad faith. At this point the court did not consider whether the bad faith

claim merely duplicated the claim for breach of the best efforts provision. At the close of evidence Cyanamid renewed its motion for judgment on the pleadings. This time the court granted the motion from the bench on the grounds (i) that the bad faith claim was duplicative of the claim for breach of the best efforts provision and (ii) that to the extent it was not duplicative, it lacked a sufficient evidentiary basis.

Judgment as a matter of law is appropriate when "there is no legally sufficient evidentiary basis for a reasonable jury to find for" the non-moving party. Fed. R Civ. P. 50(a). It should be granted when, viewing the evidence most favorably to the party opposing the motion, a reasonable trier of fact can draw only one conclusion. *Ingram Coal Co. v. Mower Ltd. Partnership*, 892 F.2d 363 (4th Cir. 1989).

West Virginia implies a covenant of good faith into every U.C.G contract. W. Va Code § 46-1-203. In the case of a merchant, "good faith" means "honesty in fact and the observance of reasonable standards of fair dealing in the trade." W. Va. Code § 46-2-103(1)(b). A best efforts provision subsumes an obligation to act in good faith in exercising those best efforts. *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119, 1126 n.7 (3d Cir. 1992). While the U.C.C. covenant of good faith is broader than an exclusive dealer's specific duty to use best efforts, *e.g. Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1443 (7th Cir. 1992); *Permanence Corp. v. Kennametal, Inc.*, 908 F.2d 98, 100 n.2 (6th Cir. 1990), to survive a motion for judgment as a matter of law Mylan must produce sufficient evidence for a jury to find bad faith beyond mere failure to use best efforts. Otherwise, the claim for breach of the implied covenant is merely duplicative of the claim for breach of an express contract provision and may not be maintained as a separate claim. *See USX Corp. v. Prime Leasing, Inc.*, 988 F.2d 433, 438 (3d Cir. 1993) ("[O]ne can invoke 'implied' terms only when there are no express terms in the contract relating to the particular issue."); *Iafolla v. Douglas Pocahontas Coal Corp.*, 250 S.E.2d 128, 134 n.3 (W. Va. 1978) ("[A]n implied covenant will not supercede [sic] an express contradictory covenant.").

We agree that Mylan's bad faith claim is based on insufficient evidence to the extent that it alleges anything other than a breach of the best efforts provision. With regard to Mylan's "bait and switch" allegation, the slide show presentation occurred *after* Mylan had signed an agreement with respect to Maxzide-25. Therefore, Mylan's claim that Cyanamid "enticed" it to enter into the agreement is insupportable. Mylan's second allegation is based entirely on a marketing plan that it found on the eve of trial was missing pages. Mylan produced no evidence that the pages were missing when Cyanamid gave the plan to Mylan, that Cyanamid knew the pages were missing, or that Cyanamid intentionally omitted the pages in an attempt to conceal information from Mylan. Even drawing all reasonable inferences in Mylan's favor, this allegation is little more than speculation. No reasonable jury could find a breach of the implied covenant of good faith from the evidence that Mylan produced. Accordingly, the district court properly granted judgment as a matter of law in favor of Cyanamid.

E. Tigg *instruction*

Mylan claims that the district court erred in denying its proposed jury instruction with regard to its breach of contract claim. The proposed instruction was based on the Third Circuit's holding in *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119, 1125 (3d Cir. 1992), that a best efforts clause "forces the buyer/reseller to consider the best interests of the seller and itself as if they were one firm." Mylan requested the court to instruct the jury that the best efforts clause required Cyanamid to act in Mylan's best interests rather than its own. *Tigg*, however, involved an implied best efforts provision. The agreement between Mylan and Cyanamid contains an express best efforts provision which explicitly limits Cyanamid's duty to efforts "consistent with its overall business objectives." In other words, the agreement allows Cyanamid to act in accordance with its own objectives if they conflict with those of Mylan. Therefore, the district court properly denied Mylan's proposed instruction.

F. *Mylan's Count I*

Mylan next contends that the district court erred in granting summary judgment on its Count I, which alleged that Cyanamid undercompensated Mylan for its purchases of Maxzide. The Maxzide agreement required Cyanamid to pay Mylan a certain amount for each package of Maxzide that Cyanamid sold. The Saydah Agreement provided a formula for this amount based on Cyanamid's "net sales" or "average selling price." Average selling price was computed by dividing Cyanamid's total revenue by the number of units actually sold. The parties disagree as to whether, when Cyanamid offered a "buy ten, get two free" discount, the two "free" units should have been counted as units "actually sold."

In its motion for summary judgment on this count, Cyanamid attached an affidavit from an expert witness that under normal trade usage the two "free" units would be considered actually sold. Mylan produced no evidence of trade usage, but rather relied on deposition testimony from Mylan and Cyanamid officials regarding their intent. Milan Puskar (Mylan's president) and Rod Jackson (Mylan's vice president) both testified that at the time the Saydah amendment was signed they believed that "free" units should not be considered actually sold. Roben Saydah (Lederle's president at the time the Saydah agreement was signed) also testified about the meaning of "net sales." While his testimony is inconsistent, part of his testimony and a sample calculation that he performed indicate he agreed with Mylan that the "free" goods should not be counted as actually sold.

The West Virginia U.C.C. provides that

> Terms . . . set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade . . . or by course of performance . . . .

W. Va. Code § 46-2-202. Under this provision, evidence of trade usage may explain or supplement even a contract that is clear on its face. *See* W. Va. Code § 46-1-205 cmt. 1 ("The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing."); W. Va. Code § 46-2-202 cmt. 1(c) ("This section definitely rejects . . . [t]he requirement that a condition precedent to the admissibility of [trade usage, course of dealing, or course of performance] is an original determination by the court that the language used is ambiguous."). However, the Code and Commentary leave unclear the extent to which other types of extrinsic evidence of intent may be admissible where a contract term is ambiguous.

The district court, citing § 46-22-202, granted summary judgment in favor of Cyanamid because of Mylan's failure to introduce evidence of trade usage. It did not consider Mylan's evidence of the parties' subjective intent. While the district court did not make clear the basis for its decision, it apparently concluded that under § 46-2-202 only evidence of trade usage, course of dealing, or course of performance is admissible to explain a contract's meaning. Thus, this issue turns on the extent to which Mylan may introduce extrinsic evidence of the parties' subjective intent to show the meaning of a contract under the U.C.C.

The U.C.C. modified the common law parol evidence rule by giving special weight to evidence of trade usage and commercial practices. In effect, trade usage becomes part of the contract:

> [Contracts] are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used.

W. Va. Code § 46-2-202 cmt. 2. *See also* W. Va. Code § 46-1-205(3) ("[A]ny usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware give[s] particular meaning to . . . terms of an agree-

ment.") Other types of extrinsic evidence may be admissible to explain an ambiguous contractual term. However, because trade usage is deemed incorporated into the contract unless specifically negated, it must be considered when determining whether a term is ambiguous. Parol or extrinsic evidence like that offered by Mylan is inadmissible to explain a term which is unambiguous when read in light of trade usage.

Furthermore, Mylan's proffered evidence shows at most the parties' unexpressed, subjective interpretations of a contract term. Both the U.C.C. and West Virginia common law express a preference for objective, rather than subjective, manifestations of intent. *See* W. Va. Code § 46-1-205 cmt. 1 ("[T]he meaning of the agreement of the parties is to be determined by *the language used by them and their action*, read and interpreted in the light of commercial practices and other surrounding circumstances (emphasis added)); *Watson v. Buckhannon River Co.*, 45 W. Va. 164, 175 (1923) ("[W]hen there is doubt as to [a contract's] proper meaning, the construction which the parties have put upon it *by their acts* is entitled to great consideration." (emphasis added)); Restatement (Second) of Contracts § 212 cmt. a (1981) ("[T]he relevant intention of a party is that manifested by him rather than any different undisclosed intention.").

Because the term "net sales" was unambiguous in light of Cyanamid's uncontested evidence of trade usage, the district court properly disregarded Mylan's proffered evidence of subjective intent. We therefore affirm the district court's grant of summary judgment on this claim.

G. *Mylan's Count V*

Count V alleged that the Saydah Agreement created a separate requirement that Cyanamid purchase a minimum quantity of Maxzide-25 in addition to Cyanamid's existing obligation to purchase a minimum quantity of Maxzide. Mylan argues that the series of correspondence leading up to the letter signed by both parties should be considered part of the Saydah Agreement. It claims that that correspondence taken as a whole shows that the parties intended to create

a separate minimum quantity requirement for Maxzide-25. The district court held that the prior correspondence was at most a series of offers and counteroffers, was not part of the contract, and was therefore inadmissible parol evidence. It concluded that the Saydah Agreement did not create a separate minimum purchase requirement for Maxzide-25. Finding no error, we affirm the judgment on this count on the reasoning of the district court. *Mylan Pharmaceuticals, Inc. v. American Cyanamid Co.*, Civ. No. 90-0121-C(S) (N.D.W. Va. July 27, 1993).

H. *Failure to recuse*

Mylan argues that the judge below erred in failing to recuse himself. While the summary judgment motions were pending, one of the judge's law clerks contacted Cyanamid's local counsel regarding potential employment. After the motions had been decided, the clerk interviewed with the firm and eventually received, but did not accept, an employment offer. The clerk continued to work on the case until Mylan's motion for recusal on the eve of trial. The judge then removed him from the case.

We find the district judge's action was entirely proper. A judge need recuse himself only when his impartiality might reasonably be questioned. 28 U.S.C. § 455(a); *People Helpers Found, Inc. v. City of Richmond, Va.*, 12 F.3d 1321, 1325 (4th Cir. 1993). The mere fact that a judge's clerk interviews with counsel for a party regarding potential future employment does not by itself create a reasonable question as to the judge's impartiality. While a law clerk must be removed from a case if he *accepts* an employment offer from a party's counsel, *see, e.g, Hunt v. American Bank & Co.*, 783 F.2d 1011, 1016 (11th Cir. 1986), in this case the judge's clerk did not accept an offer. *See* Alvin B. Rubin & Laura B. Bartell, Law Clerk Handbook 23 (1989) (stating only that "[w]hen a clerk has *accepted* a position with an attorney or with a firm, that clerk should cease further involvement in those cases in which the future employer has an interest," and implying that a judge may choose to place "no restrictions . . . on a law

clerk's applications for employment" (emphasis added). Furthermore, the judge removed the clerk from this case as soon as he was aware that the clerk had received an employment offer from Cyanamid's local counsel. This was sufficient to avoid an appearance of impropriety. *See Hunt*, 783 F.2d at 1016; *Reddy v Jones*, 419 F. Supp. 1391 (W.D.N.C. 1976). Therefore, the judge did not err in failing to recuse himself.

I. *Denial of summary judgment on Cyanamid's counterclaim for fraudulent inducement*

Mylan next maintains that the district court erred in denying its motion for summary judgment on Cyanamid's fraudulent inducement counterclaim. Despite the fact that the jury awarded no damages on this counterclaim, Mylan claims that it was prejudiced on its other claims by evidence that was admitted solely to establish fraudulent inducement. If summary judgment had been granted before trial, Mylan maintains, this evidence would have been excluded. Thus, Mylan is in the unusual posture of appealing a count on which it prevailed at trial.

Nearly every circuit to consider the issue has held that the denial of a motion for summary judgment may not be appealed following a final verdict on the merits. *See, e.g., Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir. 1994); *Black v. J.I. Case Co.*, 22 F.3d 568, 570-71 (5th Cir.), *cert. denied*, 115 S. Ct. 579 (1994); *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 19* F3d 431, 434 (8th Cir. 1994); *Lama v. Borras*, 16 F.3d 473, 476 n.5 (1st Cir. 1994); *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1358 (9th Cir. 1987). Because denial of summary judgment is interlocutory, *O'Connor v. United States*, 956 F.2d 48, 52 (4th Cir. 1992), the only appealable final judgment is the judgment on the verdict. *Johnson Int'l*, 19 F.3d at 434.

Thus, Mylan seeks to appeal a verdict in its favor. A party generally may not appeal an issue on which it prevailed on the merits. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333 (1980). While an exception exists permitting a party to appeal "an adverse ruling collateral to judgment on

the merits" if that party retains a stake in the controversy, *id.* at 333-34, a summary judgment motion is not collateral to the merits of a claim. Therefore Mylan's appeal does not fall within this exception, and we may not review the district court's denial of summary judgment.

J. *Other errors*

Mylan asserts that the district court committed four additional errors warranting reversal. First, it claims that the court improperly excluded evidence that Mylan "blew the whistle" on fraudulent practices by other manufacturers of generics. Second, it claims that the court erred in allowing Cyanamid's expert to testify as to analyses that he performed after he was deposed. Third, it maintains that the order of closing arguments was improper. Finally, it asserts that the court erred in excluding testimony about Puskar's charitable contributions. We find that none of these actions was error and affirm on the reasoning of the district court. *Mylan Pharmaceuticals, Inc. v. American Cyanamid Co.*, Civ. No. 90-0121-C(S) (N.D.W. Va. Feb. 28, 1994).

K. *Jury verdict on Mylan's Counts II and III*

Finally, Mylan claims that the verdicts on its two counts for breach of the best efforts provision were against the weight of the evidence. Judging the weight of the evidence is "a matter resting within [the district court's] sound discretion and is not reviewable save in the most exceptional circumstances." *Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989). Here, plenty of evidence indicated that Cyanamid did not breach the best efforts provision, including evidence that (1) Cyanamid strongly promoted Maxzide, (2) Maxzide's market loss was no greater than that of other brand-name drugs faced with generic competition, and (3) independent reasons existed for Maxzide's decline, including weak patent protection, changes in medical thinking, and FDA actions. The district court did not abuse its discretion in refusing to grant a new trial.

III

For the foregoing reasons, the judgment of the district court is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion on Cyanamid's counterclaim for defamation.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 90-0121-C(S)
Filed: July 27, 1993

MYLAN PHARMACEUTICALS, INC.,
a West Virginia corporation,

Plaintiff and Counterclaim Defendant,

—v.—

AMERICAN CYANAMID COMPANY, a Maine corporation,

Defendant and Counterclaimant,

—v.—

ROY MCKNIGHT,

Third-Party Counterclaim Defendant.

MEMORANDUM OPINION AND ORDER RESOLVING MOTIONS FOR SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS

I. Background

Pending before this Court are three (3) motions for summary judgment and a motion for judgment on the pleadings

filed in connection with the above civil action filed by plaintiff Mylan Pharmaceuticals, Inc. ("Mylan") against defendant American Cyanamid Company ("Cyanamid") and the counterclaims filed by Cyanamid against Mylan, individually, and against Mylan and a third-party counterclaim defendant Roy McKnight ("McKnight"). These claims, set forth in the Complaint as amended, arise out of certain contracts between Mylan and Cyanamid which provided that Cyanamid's Lederle Laboratories Division ("Lederle") would be the exclusive marketer in this country for Maxzide®, a drug used for the control of hypertension and developed and patented by Mylan. Mylan originally filed its Complaint against Cyanamid in November 1990. Mylan alleged, in four counts, that Cyanamid had breached its marketing contract with Mylan dated March 6, 1984, as modified by a letter dated February 5, 1988 from Robert Saydah ("Saydah") of Cyanamid's Lederle Division to Mylan's President Milan Puskar ("Puskar"), and signed by Puskar ("Saydah Amendment").

As noted in the Pre-Trial Order, Count I of the Amended Complaint alleges breach of contract in the computation of Mylan's compensation for Maxzide® delivered to Cyanamid after the effective date of the Saydah Amendment, which changed the original terms of compensation from a fixed price to a "20% ratio to net sales" basis. Counts II and III assert that Cyanamid breached its obligation under the basic contract requiring Cyanamid to make certain efforts to market Maxzide®. In Count IV, Mylan claims that Cyanamid breached an implied covenant of good faith and fair dealing with respect to its performance under the Maxzide® contract.[1]

Mylan amended its Complaint to assert a new claim, Count V, which alleges that the Saydah Amendment created a new contract dealing with the marketing of Maxzide®-25 mg. ("Maxzide®-25"), imposing upon Lederle an independent minimum purchase requirement for that form of Maxzide® and that Cyanamid failed to meet those minimum purchase requirements.

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[1] Mylan also originally filed a separate tort claim, as part of Count IV, for punitive damages which was dismissed by this Court by order dated April 29, 1991. The contract claim remains in Count IV.

Cyanamid, in turn, has filed four counterclaims. It originally filed three counterclaims against Mylan, in responding to the original Complaint.

By its first counterclaim, Cyanamid asserts that Mylan fraudulently induced Cyanamid to enter into the Maxzide® contract by misrepresenting the strength of patent protection Maxzide® would enjoy and by not giving Cyanamid certain material information by which Cyanamid could have determined that Maxzide®'s patent protection was weak. In its second counterclaim, Cyanamid claims that Mylan breached its duty to defend the Maxzide® patent and to defend Maxzide® from competition by generic drugs by failing, among other things, to adequately defend challenges to the Maxzide® patent made by competing companies, including Vitarine Pharmaceuticals.

Cyanamid's third counterclaim, as amended, alleges that Mylan and McKnight, Mylan's chief executive officer, are liable for defamation because of allegedly false and disparaging public remarks supposedly accusing Cyanamid of incompetence as a marketer of pharmaceuticals, and untrustworthiness as a part of the Maxzide® contracts. A fourth counterclaim, added by amendment, asserts that Mylan breached covenants under the Maxzide® agreement in failing to secure Federal Drug Administration ("FDA") approval for its advertising claims that Maxzide® was therapeutically superior to another similar drug known as Dyazide®, a product of SmithKline Beecham, also used for the treatment of hypertension and for product labeling.

Cyanamid has filed a motion for summary judgment under FED. R. CIV. P. 56 with respect to Mylan's Count I and a motion for judgment on the pleadings under FED. R. CIV. P. 12 (C) as to Mylan's Count V.

Mylan, in turn, has filed a motion for summary judgment as to Count I (fraudulent inducement) of Cyanamid's counterclaim and Mylan and McKnight have filed a motion for summary judgment as to Count III of the amended counterclaim of Cyanamid (defamation).

All motions have been fully briefed. There is no outstanding discovery with respect to these motions.

For the reasons set forth below, this Court believes that Cyanamid's motion for summary judgment as to Mylan's Count I should be GRANTED; that Cyanamid's motion for judgment on the pleadings as to Count V should be GRANTED; that Mylan's motion for summary judgment as to Count I of Cyanamid's counterclaim should be DENIED; and that Mylan's and McKnight's motion for summary judgment as to Count III of Cyanamid's counterclaim should be GRANTED.

This Court will address separately the various summary judgment motions and the motion for judgment on the pleadings.

II. Rule 56 Standards

Under FED. R. CIV. P. 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." *Id.* The party seeking summary judgment bears the initial burden of showing the absence of any issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). However, as the United States Supreme Court noted in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), "Rule 56(c) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of [the] pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 256. "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. *See also Trivathan v. Newport News Shipbuilding & Dry Dock Co.*, 944 F.2d 902 (4th Cir. 1991) [table] ("Summary judgment should be granted only in those cases where it is per-

fectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." *(citing Charbonnage De France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979); *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950))).

In *Celotex*, the Court stated that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Summary judgment is not appropriate until after the non-moving party has had sufficient opportunity for discovery. *Oksanen v. Page Memorial Hospital*, 912 F.2d 73, 78 (4th Cir. 1990). In reviewing the supported underlying facts, all inferences must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The parties have submitted deposition transcripts and documentary evidence in conjunction with their respective motions and memoranda. No discovery requests appear to remain outstanding.

III. Rule 12(c) Standards

A Rule 12(c) judgment on the pleadings is addressed to the function of disposing of cases on the basis of the underlying substantive merits of the claims and defenses as revealed in the formal pleadings and what is subject to judicial notice. 5A C. WRIGHT & A. MILLER *Federal Practice and Procedure: Civil 2d* § 1367 (1990). A Rule 12(c) motion should not be granted unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Haines v. Kerner*, 404 U.S. 519 (1972); *Mostowy v. United States*, 966 F.2d 668, 672 (Fed. Cir. 1992). The moving party must clearly establish that he is entitled to judgment as a matter of law, and all pleadings

are considered in the light most favorable to his adversary. *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478 (6th Cir. 1973); *Roemheld v. Jones*, 239 F.2d 492 (8th Cir. 1957).

IV. Cyanamid's Motion for Summary Judgment on Count I of Mylan's Amended Complaint—"Free Goods"

With respect to this motion, it is undisputed that:

1. Under the terms of the Maxzide® Agreement, Cyanamid's Lederle Division had complete authority with respect to the establishment of the prices at which it would sell Maxzide® to its customers.

2. Under the terms of the Maxzide® Agreement, as amended on February 5, 1988, following the entry of generic competition, the price charged by Mylan to Lederle for both the Maxzide®-50 mg. ("Maxzide®-50") and Maxzide®-25 strengths is 20 percent of net sales, with a minimum price of $6.15 per 100 tablet bottle of Maxzide®-50 and $4.25 per 100 tablet bottle of Maxzide®-25.

3. By common definition, "net sales" equals the balance of gross sales remaining after deducting trade discounts, rebates, returned sales and sales allowances. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged) 1520 (1981); BLACK'S LAW DICTIONARY 1041 (6th Ed. 1990).

4. a. From time to time Lederle reacts to competition with promotional offers of "free goods" to induce customers to purchase larger quantities of Maxzide®, or to grant important customers price discounts, without altering Lederle's normal pricing structure or changing the list price of Maxzide®, although Mylan disputes whether all such promotional offers were made for this purpose.

b. Under the standard use of the term "free goods", customers to whom "free goods' offers of Maxzide® are extended must purchase a specified quantity of the product at the list price in order to receive the corresponding number of "free"

units. No "free goods" are distributed in circumstances other than when the customer has fulfilled the agreed-upon purchase requirement. "Free goods" are units of Maxzide® that are packaged and labelled identically with other bottles of the drug delivered to customers.

While Mylan agrees with Cyanamid's dictionary definition of the term "net sales", it asserts that there is a genuine issue of material fact as to whether "free goods" as distributed by Cyanamid should be considered as "trade discounts" to calculate "net sales" under the Maxzide® agreements. Further, while Mylan concedes that the "free goods" offers made by the Lederle are, as a matter of economic theory and business reality, a type of quantity discount which is economically and functionally identical to a discount based upon a percentage off of list price (i.e. a "buy three get one free" offer is indistinguishable from a 25 percent discount with a minimum purchase of four units), Mylan contends there exists a genuine issue of material fact as to whether a "free goods" promotional offer is the same as a price discount for the particular purpose of calculating "net sales" and, therefore, Mylan's per unit compensation under the Maxzide® agreements, it being Mylan's assertion that the cost of a "free goods" promotion was to be considered as part of the advertising and promotion costs to be borne by Cyanamid under the Maxzide® agreements and that the units distributed as "free goods" were not to be included in calculating average selling price to determine the amount of Mylan's compensation. In addition, Mylan agrees that "free goods" do not serve the same function as samples, which are not contingent upon purchase of the product, but are given to physicians to enable them to become familiar with a drug and to start patients on that drug. However, Mylan agrees with this distinction only as it shows the difference between the two marketing techniques but disagrees that this means that "free goods" promotions do not constitute a part of the advertising and promotion of a product. It is undisputed that samples, as a form of advertising and promotion, serve an informational and promotional purpose, stimulating awareness in the medical community of the prod-

uct, thus creating additional demand. Under the Maxzide® Agreement, Lederle buys samples in bulk from Mylan at a fixed price. These samples are specifically packaged for that purpose, are distributed only to physicians and cannot be resold. Further, while Mylan agrees that generally accepted accounting principles require that units delivered in satisfaction of "free goods" offers, such as those offered by Lederle for Maxzide®, be accounted for as units sold, it disagrees that this means that the cost of "free goods" should not be considered as an advertising or selling expense under the Saydah Amendment.

Simply put, Cyanamid contends that "free goods" do not constitute either an advertising or a selling expense but, rather, are a form of discount which reduces the unit price of the goods sold as an inducement for a greater sales volume.

While Mylan does not appear to quarrel with the strict accounting definition of "free goods", it argues that Cyanamid's witnesses during discovery have, themselves, used the term in a manner connoting promotion or inducement to purchase.

Mylan states that the issue in Count I is how the "per unit" compensation due Mylan for all units shipped to Cyanamid in any compensation period should be calculated when "free goods" promotions were offered by Cyanamid.

Cyanamid, as part of its Appendix supporting its motion for summary judgment, has provided the affidavit of Richard P. Rozek, an economist with National Economic Research Associates, Inc., which, based upon his experience analyzing pricing and marketing practices generally and particularly in the pharmaceutical industry discusses the forms of various discounts including the use of "free goods" which he points out "are commonplace in the packaged goods industry". In particular, Mr. Rozek then concludes at paragraphs 7, 8 and 15:

> 7. It would be illusory to regard the units of the product obtained at such a discount as actually being free. The so-called "free" units are not "given away," but rather are an integral part of the bargain between the buyer and seller. These additional free units are equiv-

alent to a volume discount that alternatively could be expressed as a percentage priced reduction conditioned on the purchase of an entire set of units. For example, a sale of "one free with purchase of three" is the same as offering a 25 percent discount with the purchase of four units. Either way, it amounts to a revenue reduction to the seller of that amount.

8. In the case of pharmaceuticals, free goods offers to wholesalers, pharmacies or government agencies do not serve an advertising function. It would be misleading to characterize the cost of the units included in volume transactions of this sort as a sales or advertising expense. By providing this form of discount, the seller merely receives less revenue from the sale of the product. . . .

15. In sum, the free goods components of the deals at issue in this case do not represent advertising expenditures. They are simply a form of discount from list price. Such discounts are part of the bargained for consideration between the buyer and seller. They reduce the transactions price compared to the list price for the product. Thus, they reduce the sales revenue from the aggregate number of units sold. Treating the delivery of these units as an ASP expense, and not including them in net sales, would present a distorted picture of a firm's sales, the value of the product to customers, and the prices actually realized in the marketplace.

Therefore, Mr. Rozek in effect sets forth evidence from Cyanamid's standpoint as to the treatment of "free goods" in the pharmaceutical marketplace, speaking to the usage of trade under the Uniform Commercial Code as it is enacted in West Virginia in W. VA. CODE § 46-1-205 (1966) . The meaning of an agreement must be determined by the language the contracting parties used read in the light of commercial practices. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

W. VA. CODE § 46-1-205, Comment 1, (*quoted in Witner v. Kleppe*, 469 F.2d 1245 (4th Cir. 1972).

Mylan, in responding some months ago to Cyanamid's motion to dismiss Count I under FED. R. CIV. P. 12(b)(6), which motion this Court denied, stated:

> Obviously, it is Mylan's position, as its experts and others will testify, that the term "net sales" as used in the pharmaceutical industry, and under generally accepted accounting principles, does not include reductions for free goods distributed for promotional purposes. Such costs instead are deemed marketing or promotional costs, similar to personnel and advertising expenses and treated as costs of goods sold. No doubt free goods costs are incurred, but they are solely Cyanamid's burden . . . .
>
> Mylan seeks . . . the right to adduce evidence in support of the custom and usage of trade upon which it relied at the time it made its various agreements with Cyanamid, which custom and usage of trade, by express statutory provision, must be considered by the Court in any determination of the rights of the parties.

Plaintiff's Opposition to Motion to Dismiss, Feb. 26, 1991, at 8-9.

However, Mylan has presented no evidence in connection with Cyanamid's motion for summary judgment to refute the detailed affidavit of Mr. Rozek and the evidence of Cyanamid by other witnesses as to trade usage of "free goods" and its impact upon the calculation of compensation through either the term "net sales" or "average selling price" under the Saydah Amendment, at least none to set forth any genuine issues of material fact on this subject.

In the context of this motion, Mylan defends the evidence presented by the Rozek affidavit and other evidence by simply contending:

In asserting that there is no genuine issue of fact as to how "free goods" should be treated in calculating Mylan's compensation, Cyanamid conveniently ignores the fact that it has to date refused to depose Mylan's expert witnesses, who are

expected to support Mylan's interpretation of the agreements with respect to compensation calculations. Appendix J, Memorandum in Opposition to Defendant's Rule 56(c) Motion for Summary Judgment on Count I of the Amended Complaint, May 19, 1993, at 2.

The fact that Cyanamid, for whatever reason, did not take the deposition of Mylan's designated expert witnesses on this subject does not in any way preclude Mylan from obtaining and submitting a counter-affidavit in opposition to Cyanamid's motion on Count I sufficient to at least raise a genuine issue of fact on the issue of "free goods" in the interpretation of the Saydah Amendment and the determining of compensation to Mylan under the contract. This has not been done by Mylan and Mylan has presented no other evidence sufficient to show a genuine issue of material fact. Mylan cannot rest alone upon its pleadings and its counsel's argument. Further, this Court finds no support for the claim in Count I that Cyanamid failed to exercise its pricing discretion in good faith, at least as it applies to the "free goods" issue.

For the above reasons, Cyanamid's motion for summary judgment as to Count I of the Amended Complaint is GRANTED.

V. Defendant American Cyanamid's Motion to Dismiss Count V of Mylan's Amended Complaint

This motion is filed by Cyanamid pursuant to FED. R. CIV. P. 12(c) for judgment on the pleadings as to Count V of Mylan's Amended Complaint.

In Count V of the Amended Complaint, Mylan incorporates by reference the allegations it has made in paragraphs 1-37, 39-47, 49-56, 58-65 and 67-77 of the Amended Complaint and contends that "[i]n addition to the breaches alleged in the preceding counts of this Complaint, Defendant otherwise breached its obligations under the agreements to purchase certain minimum quantities of Maxzide® and/or Maxzide®-25 as specified in Paragraph 7 of the Contract of March 6, 1984 for Maxzide® (Exhibit A hereto) and as required by the

"Saydah Amendment" for Maxzide®-25 (Paragraphs 31 and 32 above)."

Paragraphs 31 and 32 of the Amended Complaint read as follows:

> 31. After brief negotiations, Mylan and the then-management of Defendants' Lederle Division reached an agreement which allowed Lederle to assume a role with regard to the new product almost identical in terms to its Maxzide® agreement. In fact the material terms varied only in the areas of price and product specifications.
>
> 32. Although the agreement with regard to the 37.5/25 mg product was never reduced to formal contract, it was embodied in a series of correspondence which included: a letter from Robert Saydah, then Vice President of Defendants' Lederle Division, to Milan Puskar, then and now president of Mylan, dated January 19, 1988; Puskar's letter in response of January 27, 1988; and a further letter from Saydah, dated February 5, 1988, which Puskar also signed; copies of which letters are attached hereto as Exhibits B, C and D, respectively, and are hereinafter referred to, collectively, as the "Saydah Agreement".

Cyanamid in its attack upon Count V by way of its motion of judgment on the pleadings, analyzes the three letters cited in paragraph 32 of the Amended Complaint and asserts that because of the West Virginia statute of frauds and the parol evidence rule, these documents do not establish an enforceable independent agreement binding Cyanamid to buy minimum quantities of Maxzide®-25.

First, Cyanamid maintains that the only document of the three documents alleged by Mylan to form the independent minimum purchase contract, which is an agreement between the parties, is the February 5, 1988 letter (i.e. the "Saydah Amendment") and this document is only an amendment to the original Maxzide® Agreement of March 6, 1984 and is not an agreement which imposes a requirement to make minimum purchases of Maxzide®-25.

Cyanamid states that the other two documents referenced in paragraph 32 of the Amended Complaint, the January 19, 1988[2] letter from Robert Saydah of Cyanamid to Milan Puskar of Mylan and the January 27, 1988 letter in response from Puskar to Saydah dated January 27, 1988, is merely a proposal and a counter-proposal, neither of which were accepted by the other party. Cyanamid points out that these two letters are not incorporated into or referred to by the Saydah Amendment of February 5, 1988, which is signed by both parties.

Cyanamid argues that the two letters of January 19, 1988 and January 27, 1988 independently could not constitute an enforceable contract since they do not meet the requirements under the West Virginia statute of frauds.

The West Virginia statute of frauds provides, in part:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.[3]

Cyanamid also contends that the February 5, 1988 Saydah Amendment does not constitute an independent contract for minimum purchases of Maxzide®-25 under the statute of frauds because the quantity is not specified.

Cyanamid maintains that the Puskar letter of January 27, 1988 is merely a statement of a negotiating position regarding Maxzide®-25 tablets. The Puskar letter states that Mylan

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[2] The typed date of this letter is actually January 20, 1988.

[3] The parties appear to agree that the statute of frauds under the West Virginia Uniform Commercial Code, rather than the more general statute of frauds under W. VA. CODE § 55-1-1, *et seq.* is applicable.

has "concluded" that the "basic terms and conditions of the Maxzide® contract, dated March 6, 1984 should control with the exception of the pricing. . . ." It then recites certain prices, the effective dates, and how subsequent adjustments to Cyanamid's price to customers would offset a change in Mylan's prices to Cyanamid. The Puskar letter is not signed by any representative of Cyanamid. The Puskar letter is in response to Saydah's letter to Puskar dated January 19, 1988 and appears to this Court to be a proposal which was not accepted by Mylan in the subsequent January 29, 1988 letter. This Court believes that, at best, the two letters are merely an offer by one party which was not accepted by the other. Moreover, the February 5, 1988 Saydah Amendment does not incorporate the above-mentioned two letters into that contract, and even though it is a contract, it is not an independent arrangement for the purchase of a specific quantity of Maxzide®-25 tablets.

W. VA. CODE § 46-2-202 (1966), a codification of the parol evidence rule in the Uniform Commercial Code states, in part:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented. . .
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

This Court further finds that the letters of January 19, 1988 and January 27, 1988 should be excluded under the above statute because this Court believes that the original Maxzide® Agreement of March 6, 1984 and the Saydah Amendment

were intended by the parties to form and constitute a complete and exclusive statement of those agreements.

Mylan asserts for the first time in Plaintiff's Memorandum in Opposition to Defendant's Rule 12(c) Motion to Dismiss Count V of the Amended Complaint that another letter, one dated November 6, 1985 from Cyanamid's Group Manager L. J. Marquard to Mylan should form the basis of an independent agreement. This letter is not cited in or attached to the Amended Complaint as a basis for Mylan's claims under Count V.

FED. R. CIV. P. 12 (C) provides that if matters in addition to the pleadings are presented and are not excluded in a motion for judgment on the pleadings, the motion shall be treated as one for summary judgment in accordance with FED. R. CIV. P. 56. It is in the Court's discretion whether to accept a matter in addition to the pleadings. *A. S. Abell Co. v. Baltimore Typographical Union Number 12*, 338 F.2d 190 (4th Cir. 1964), *M. L. Lee & Co. v. American Cardboard & Packaging Corp.*, 36 F.R.D. 27 (E.D. Pa. 1964); *see* 5A C. WRIGHT & A. MILLER § 1371.

This Court concludes that the Marquard letter should be excluded because Mylan specifically based its Count V claim upon the above-mentioned three letters and the Marquard letter, written over two years before the Saydah or Puskar letters and the Saydah Amendment, does not appear to have been referred to or incorporated into any of these documents, and is not relevant to a determination of the claim.[4]

For the above reasons, this Court finds that the motion of American Cyanamid for judgment on the pleadings as to Count V must be GRANTED.

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[4] Even if this Court were to convert this motion for judgment on the pleadings to a summary judgment motion, which it does not, it would find that this single letter would not result in a denial of summary judgment for Cyanamid on Count V of the amended complaint.

VI. Counterclaim Defendant Mylan's Motion for Summary Judgment on Cyanamid's Counterclaim for Fraudulent Inducement (First Counterclaim)

Cyanamid's first counterclaim to the Amended Complaint charges that Mylan fraudulently induced Cyanamid to enter into the Maxzide® Agreement by misrepresenting the strength of the patent protection Maxzide® would enjoy, and by failing to provide Cyanamid with material information from which Cyanamid would have determined that Maxzide®'s patent protection was weak. This claim is set forth as paragraphs 97 through 114 of Cyanamid's amended answer and counterclaims. Stated another way, Cyanamid believes that Mylan misrepresented the availability of market exclusivity through patent protection and that Cyanamid reasonably relied upon these misrepresentations when it entered into its Maxzide® marketing agreement with Mylan.

Pursuant to LOCAL COURT RULE 2.07(d), Mylan has filed a statement of undisputed facts in support of its motion for summary judgment as to the first counterclaim of Cyanamid. In turn, Cyanamid, under LOCAL COURT RULE 2.07(d), has filed its statement of the genuine issues to be tried on the first counterclaim.

As noted by Mylan, a party making a claim for fraudulent inducement must establish: (1) a material misrepresentation by the defendant; (2) reasonable reliance on that misrepresentation by claimant and (3) damages resulting from the reliance. RESTATEMENT (SECOND) OF TORTS § 525. It is also agreed that proof of these elements must be by clear and convincing evidence. Mylan claims that no such misrepresentations were ever made and that even "if any false impression was created by Mylan's enthusiasm for its produce, Lederle did not rely on that impression in deciding to enter into the agreement." Memorandum in Support of Counterclaim Defendants' Motion for Summary Judgment on Cyanamid's Counterclaim for Fraudulent Inducement at 4. On the other hand, Cyanamid asserts that Mylan frequently stated that Maxzide®

would enjoy certain market exclusivity under a "unique" process known as "parallel granulation", which according to Cyanamid turned out not to be unique at all, and that Mylan had no basis for believing this. Cyanamid also contends through certain deposition testimony that Mylan was aware that Cyanamid would not risk its corporate resources needed to "launch" and market Maxzide® without having market exclusivity obtained by patent.

Cyanamid argues that there are genuine issues of material fact which exist not only as to Mylan's state of mind respecting certain statements but also as to Cyanamid's reliance upon such statements. Cyanamid notes that under West Virginia law an action for fraud lies where a defendant either knows that a statement is false, makes the statement without knowledge as to its truth or falsity, or makes it under circumstances such that he should have known of its falsity. The defendant is under a duty to know that the things he represents as facts are in fact true at the time he makes the representation. *Lengyel v. Lint*, 167 W. VA. 272, 280 S.E.2d 66, 69 (1981).

While agreeing that a claimant's reasonable reliance is a key element in a fraud claim, Mylan points out, citing *Rockley Manor v. Strimbeck*, 181 W. VA. 313, 382 S.E.2d 507 (1989), that:

> Though a purchaser may rely upon particular and positive representations of a seller, yet if he undertakes to inform himself from other sources as to matters easily ascertainable, by personal investigation, and the defendant has done nothing to prevent full inquiry, he will be deemed to have relied upon his own investigation and not upon the representations of the seller.

However, as Cyanamid asserts, in those situations where parties lack equal knowledge regarding the subject matter of a transaction, a party who has acted with reasonable diligence may rely on the representations of the party with superior means and opportunity to acquire information, and may recover for fraud if material facts are misrepresented. 37 AM.JUR.2D *Fraud & Deceit* § 253 (1968).

While this Court recognizes that the burden of proof for Cyanamid on its first counterclaim is ultimately a rather heavy one specifically, proof by clear and convincing evidence, the Court believes that at this stage of this civil action, Cyanamid has presented sufficient material to counter Mylan's pre-trial motion for summary judgment and that, at this point, there appear to be genuine issues of material fact on the fraudulent inducement counterclaim. Consequently, for the reasons set forth above, the motion of Mylan for summary judgment on Cyanamid's first counterclaim must be DENIED.

VII. Counterclaim Defendant Mylan and McKnight's Motion for Summary Judgment on Cyanamid's Counterclaim for Defamation (Third Counterclaim)

Cyanamid's third counterclaim asserts that Mylan and its chairman and chief executive officer McKnight are liable in compensatory and punitive damages to Cyanamid for defamation arising out of several allegedly false and disparaging statements accusing Cyanamid of incompetence in marketing pharmaceuticals and unworthiness as a contracting party.

Cyanamid alleges that the defamatory statements made by two Mylan representatives, Roy McKnight and Patricia Sunseri, and attributable to Mylan are:

> (1) a false report by Patricia Sunseri, Mylan's Vice President-Investor and Public Relations, repeated in the New York Times, that Cyanamid failed adequately to promote Maxzide®; (2) a false accusation by McKnight, reported verbatim in a business newspaper, that Cyanamid was "not living up to its contract" with Mylan; (3) false charges of wrongdoing on Cyanamid's part, including breach of contract, made by McKnight to an important annual gathering of pharmaceutical industry representatives and trade media in New York; and (4) false accusations, made by Sunseri to an investment analyst specializing in the pharmaceutical industry, and subse-

quently widely disseminated, that Cyanamid ceased ordering Maxzide® from Mylan in response to the filing of Mylan's complaint in this action.

Counterclaimant American Cyanamid Company's Memorandum of Law in Opposition to Motion of Counterclaim Defendant Mylan Pharmaceuticals, Inc. for Summary Judgment Dismissing the Third Counterclaim for Defamation at 3.

(a) *Roy McKnight's Initial Statement*

On April 16, 1991, following the filing of this lawsuit by Mylan against Cyanamid in November 1990, and after presumably the reports of the lawsuit had circulated within the pharmaceutical industry, McKnight acting for Mylan spoke to a group of pharmaceutical industry representatives and members of the trade media at the Furman Selz Generic Drug Conference in New York. In the course of commenting upon this civil action, McKnight said: [O]ur orders from Lederle have really dwindled. In fact, at the moment, they're nonexistent." McKnight went on to say that Lederle was "digging its hole deeper and deeper." Cyanamid contends that these statements were false because Lederle had actually been continuing at routine levels to place substantial orders for both Maxzide® and Maxzide®-25 and that McKnight (and, therefore, Mylan) either knew the statements concerning lack of orders were false or made no attempt to confirm their accuracy (i.e. that the statements were made maliciously, with the intent to defame Cyanamid, either with knowledge of their falsity or with reckless disregard for their truth). These remarks, says Cyanamid, impugned its character and business reputation, "carrying the strong implication that Cyanamid was incompetent, negligent or otherwise unfit as a marketer of pharmaceuticals or as a business partner". Pre-Trial Order at p. 43. Further, Cyanamid states that McKnight's defamatory remarks continued when these remarks were reported in the April 22, 1991 edition of the F-D-C Reports, also known as "The Pink Sheet", a weekly publication purportedly having a broad circulation throughout the pharmaceutical industry.

(b) *Additional Statements*

Cyanamid asserts that two months after McKnight's defamatory statements about Cyanamid (and after Cyanamid's original defamation counterclaim was filed) Patricia Sunseri, Vice President-Investor and Public Relations for Mylan, made similar defamatory statements about Cyanamid. In June 1991, Glenn Reicin, an investment analyst with Oppenheimer & Co., Inc. ("Oppenheimer") called Sunseri to request information about Mylan's performance during the first quarter of Mylan's 1992 fiscal year. Cyanamid notes that the purpose of Reicin's call was to collect financial data in order to provide advice to investors.

Cyanamid says that Sunseri falsely informed Reicin that Cyanamid had stopped ordering Maxzide® in response to this lawsuit by Mylan. Cyanamid then alleges that Reicin later incorporated that false statement by Sunseri into his investor's newsletter dated July 19, 1991, which reported:

> [Mylan's] sales are weak since American Cyanamid has stopped ordering the company's largest selling product, Maxzide® (antihypertensive). We estimate that Maxzide® sales fell in the $15 million area in fiscal 1991.
>
> Mylan has sued Cyanamid for not promoting Maxzide® to the best of its ability. Mylan wants the product back. Unfortunately, Cyanamid responded with a cutoff in orders for the product.

Pre-Trial Order at p. 44; Amended Answer and Counterclaims pp. 31-32.

The Reicin report was then circulated by Oppenheimer and was mailed to its investor clients as well as to other companies in the health care field. The allegedly false statement was also republished in an issue of "SCRIP", a newsletter supposedly widely circulated within the international pharmaceutical industry. "SCRIP", reported, in or around June 1991:

> American Cyanamid has responded to Mylan's $240 million suit agains. it for alleged violation of a mar-

> keting agreement for the antihypertensive/diuretic, Maxzide® (triamterene-HCTZ), by ceasing all orders of the product from Mylan, according to Oppenheimer & Co. analyst Glenn Reicin. Mylan has noted that sales of Maxzide® were depressed in fiscal 1991; Mr. Reicin estimates that sales could have fallen by $15 million compared with the previous year.

Cyanamid also accuses Mylan of other defamatory statements by Mylan through Sunseri. Cyanamid claims that Sunseri was interviewed by the *New York Times*, following which interview that newspaper reported in August 1990, before Mylan filed this suit, in an article dealing with Mylan's options for distributing another drug, Eldepryl®:

> Mylan could also set up an exclusive licensing agreement similar to the one it struck with American Cyanamid Company's Lederle unit six years ago to market Maxzide®, Mylan's branded blood-pressure drug. But Mylan executives say they have ruled out that option.
>
> "It's not our intent to license anything again," Ms. Sunseri said. She said that after Lederle paid a small up-front fee for the right to sell Maxzide® and oversaw a promising launch, the drug languished while Lederle's sales force pushed other products.

Cowan, *Wall Street: Did the Short-Sellers Stumble?*, N.Y. TIMES, Aug. 19, 1990, § 3, at 14, Col. 3. Amended Answer and Counterclaims at p. 33.

Moreover, Cyanamid relates that the false statements by McKnight and Sunseri about the placement of orders for Maxzide® were just part of a "prolonged, broadside attack on Cyanamid's marketing competence". An article in the November 26, 1990 edition of the Pittsburgh Business Times & Journal described Mylan's business successes and then reported:

> "But less encouraging for Mylan has been its experience with Maxzide® . . . . McKnight is not pleased with Lederle's performance, and he issued a strong warning."

Marano, *Prescription for Success: Mylan Battles FDA, Market Forces to Succeed in Volatile Industry,* PITT. BUS. TIMES & J., Nov. 26, 1990, § 3, at 9.

The newspaper then reported the following statement by McKnight:

> Lederle's sales and efforts have been a great disappointment to us. Lederle literally is not living up to their contract, and if they don't straighten up their act, then we'll take whatever steps have to be done to change that.

Cyanamid contends that the above statements by McKnight and Sunseri, made as officers of Mylan, and identified at paragraphs 126 through 136 of Cyanamid's third counterclaim, were "intended to disparage Cyanamid, and in fact, damaged its business reputation because they falsely portrayed its Lederle Division as being incompetent, negligent, or otherwise unfit as a marketer and distributor of pharmaceutical products or as a business partner." Amended Answer and Counterclaims at pages 33 and 34. Cyanamid amplifies these charges in its statements made a part of the pretrial order by stating:

> The false assertion that Cyanamid had ceased placing orders carries with it the direct claim that Cyanamid has breached or reneged on its contractual obligations. Moreover, that false statement, as well as the others set forth above, strongly imply that Cyanamid is not actively promoting Maxzide® in the marketplace and in fact may be abandoning it, thereby signifying a lack of confidence in the drug itself. This type of publicity can have a demoralizing effect on the Cyanamid sales force. Such statements create the impression in the minds of prescribing physicians, distributors, wholesalers and pharmacies that—Maxzide® may not be as good as or as widely used as they previously thought. The dynamics of the marketplace are such that, as a result, prescriptions will decline, inventories will shrink and sales opportunities

> will be lost. More importantly, such statements, carrying with them the message that Cyanamid is an unreliable or incompetent business colleague, are likely to have a direct adverse effect upon Cyanamid's ability to enter into agreements or form associations with other firms. As a result of those defamatory statements, Cyanamid is entitled to recover compensatory and punitive damages.

Pre-Trial Order at p. 45.

In order to properly address the question of whether Mylan and McKnight are entitled to summary judgment, this Court must first analyze and then determine in light of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) whether Cyanamid is a public or private figure.

New York Times v. Sullivan which gave constitutional dimension to the American law of defamation, held that actions by public officials must be supported by "actual malice", a constitutional term of art defined as publishing a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."

Professor Smolla in his treatise cited by Mylan, McKnight and Cyanamid notes that "[m]ost of the framework for the modern law of defamation estimates from *Gertz v. Robert Welsh, Inc.* which established the principal dichotomy of contemporary defamation law, the distinction between public official and public figure plaintiffs on the one hand, and private figure plaintiffs on the other." RODNEY A. SMOLLA, *Law of Defamation* § 1.05[3] at 1-14.

Gertz reaffirmed *New York Times*, and several cases following that decision, in deciding that actual malice was required for public figures and public officials. *Gertz* divides public figures into two categories, "limited" (or "vortex") public figures and "universal" (or "unlimited" or "pervasive") public figures. The term "limited" public figure has been refined in later cases. *Times. Inc. v. Firestone*, 424 U.S. 448 (1976), *Wolston v. Readers Digest Association, Inc.*, 443 U.S.

157 (1979) and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), SMOLLA § 2.07, 2.08 at 2-22 to 2-29.

The determination of whether a defamation plaintiff is a public or private figure is ultimately one of law. *Fitzgerald v. Penthouse Int'l., Ltd.*, 691 F.2d 666, 669-70 (4th Cir. 1982).

As Smolla notes: "Virtually all the approaches adopted by lower courts to define "public figure" status involve two basic subcomponents:

(1) A 'public controversy' of some kind must exist.

(2) There must be 'involvement' by the plaintiff in that 'public controversy' ". SMOLLA § 2.09[2] at 2-30.

Several appellate courts have adopted multi-factor tests. The Fourth Circuit in *Fitzgerald v. Penthouse International, Ltd.*, 525 F. Supp. 585 (D. Md. 1981), *aff'd in part and rev'd in part*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983), adopted a five factor test set forth by the district court. In it, the Court must assess:

(1) the plaintiff's access to effective channels of communication;

(2) the extent to which the plaintiff voluntarily assumed the role of special prominence in regard to public controversy;

(3) the extent to which the plaintiff sought to influence the outcome of the controversy;

(4) whether the controversy predated the publication of the allegedly defamatory communication; and

(5) whether the plaintiff's public figure status was retained at the time of the publication.

The Second Circuit in *Lerman v. Flynt Distributing Company*, 745 F.2d 123 (2nd Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) has laid down a four point test in which the defendant must prove that the plaintiff has:

(1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of the litigation;

(2) voluntarily injected himself into a public controversy related to the subject of the litigation;

(3) assumed a position of prominence in the public controversy; and

(4) maintained regular and continuing access to the media.

While both Mylan and Cyanamid have at different times argued that the law of the place of the wrong (i.e. Second Circuit) should apply, this court believes that the Second Circuit approach and the approach of the law of the forum (Fourth Circuit) are substantially similar and in this case would yield the same result.

Of course, not all factors will be relevant in every case. One important factor cited in *Gertz* is "access to the media" because public figures are more likely to have effective opportunities for self-help when defamed. Since, generally, public figures enjoy significantly greater access to channels of effective communication, the Court in *Gertz* assessed that they have, as a class a more realistic opportunity to contradict the lie or correct the error than do private individuals. SMOLLA § 2.05, at 2-21 to 222. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 344. Here, Cyanamid a large public corporation with considerable access to the general and financial media, including through its prestigious pharmaceutical division, Lederle, the media involved in covering the pharmaceutical industry, could certainly have countered and corrected any false statements by McKnight or Sunseri with regard to Cyanamid's orders of Maxzide® products or the filing of the lawsuit by Mylan.

However, there is nothing in the record that Cyanamid made, or even attempted to make, any rebuttal. It neither requested a retraction or correction of the statements or

sought to respond to the newsletter and newspaper articles in later issues. Instead, it filed this counterclaim. *See Reuben v. Food Chemical News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991).

Cases dealing with whether a defamation plaintiff is a public figure have stressed that the plaintiff must have voluntarily injected himself into the public controversy. However, this general point is well-addressed by Smolla in his treatise:

> Plaintiffs sometimes advance the argument that they cannot properly be classified as public figures because they did not "voluntarily" invite media attention, even though they may have voluntarily engaged in the activity out of which the media attention arose. Based on a popular misconception surrounding the public figure issue, this is an altogether spurious defense. Of course many plaintiffs find media attention undesirable, particularly unflattering attention, and do not volunteer for it. But just as the media is not permitted to bootstrap itself into creating its own defense by focusing attention on the plaintiff through the very speech alleged to be defamatory, the plaintiff is not permitted to avoid the strictures of the actual malice standard by protesting, "I didn't want the attention." The proper question is not whether the plaintiff volunteered for the publicity but whether the plaintiff volunteered for an activity out of which publicity would foreseeably arise. [Footnotes omitted]

SMOLLA § 2.13[2].

As the Fourth Circuit stated in *Reuben v. Food Chemical News, Inc.*, 925 F.2d at 709 (4th Cir. 1991): "[E]ven "involuntary" participants can be public figures when they choose a course of conduct which invites public attention", citing *Clyburn v. New World Communications, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990); *McDowell v. Paiewonsky*, 769 F.2d 942, 949-50 (3d Cir. 1985).

When a defamation plaintiff (or in this case, a counterclaimant) is a corporation, as is Cyanamid, some special

problems arise in determining whether to classify that corporation as a public or private figure, including the fact that corporations are deemed to be fictional legal entities who could be said to have no "reputational interest" or "feelings"; that an issue of business conduct or "commercial speech" exists; and that corporations are often "pervasively visible and powerful economic, political and social forces in American life". SMOLLA § 2.24[1] at 2-81 to 2-82. It appears that the Supreme Court has not yet dealt with the application of the public figure test in a corporate plaintiff setting. SMOLLA § 2.24[6] at 2-86. However, district courts have held that the plaintiff corporation was a public figure in *Bose Corporation v. Consumers Union of the United States, Inc.*, 508 F. Supp. 1249, 1274 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982) *aff'd*, 104 S. Ct. 1949 (1984) and in *Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977).

In this case, there is no question that Cyanamid, a large publically traded international corporation, volunteered for an activity out of which publicity was generated through the comments made by McKnight and Sunseri. It willingly and for well-understood business purposes entered into the marketing agreements with Mylan, which dealt with an important drug for the treatment of hypertension, one which both Cyanamid and Mylan hoped and expected would displace a rival company's drug, Dyazide®, thus generating large profits for both Mylan and Cyanamid. As Cyanamid put it, Mylan needed the "expertise and resources of a company accustomed to marketing branded pharmaceutical products in order to market the new drug effectively". Pre-Trial Order (Defendants' Statement of Facts to be Proved at Trial) at p. 15. Following the public announcement of the marketing arrangement for Maxzide®, Cyanamid proceeded a "launch" of Maxzide® which was of "virtually unprecedented intensity, using a broad spectrum of media to create product awareness and name recognition quickly, and more importantly, to educate the medical community as to the pharmacological

features of the new drug. The launch also included intense selling efforts aimed at drug wholesalers and retailers to insure well-stocked pharmacy shelves ready to fill the prescriptions written as a result of Cyanamid's promotional efforts. After the launch, Cyanamid sustained aggressive marketing and promotional efforts, using a variety of techniques to maintain a high level of awareness of Maxzide® among prescribing physicians." Pre-Trial Order (Defendants' Statement of Facts to be Proved at Trial) at p. 20.

Maxzide® is, according to Cyanamid, a commercial success, prescribed by tens of thousands of doctors for use by hundreds of thousands of patients, described in textbooks used at medical and pharmacy schools, as well as drug evaluations published by the American Medical Association and other institutions. Certainly, Cyanamid's involvement with this major drug in a highly competitive and regulated industry would lead it to foresee the activity out of which the alleged defamatory statements would occur. Consequently, this Court believes that Cyanamid's argument that Mylan by filing this lawsuit is merely attempting to "bootstrap" Cyanamid into a public figure category is without merit.

This Court therefore finds that Cyanamid in the context of the third counterclaim is a limited public figure.

In order to recover compensatory damages for defamation, a public figure must show actual malice with convincing clarity, *New York Times*, 376 U.S. at 285-286. To recover punitive damages for defamation related to a matter of public concern, any party regardless of status must show actual malice under a clear and convincing evidence standard. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990).

The actual malice standard has been best clarified in *St. Amant v. Thompson*, 390 U.S. 727 (1968) an aftermath of the *New York Times* definition that a statement is made with "actual malice" when it is made "with knowledge that it was false or with reckless disregard of whether it was false or not". *New York Times*, 376 U.S. at 280. In *St. Amant*, the Court held that "reckless conduct is not measured by whether

a reasonably prudent man would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant*, 390 U.S. at 731.

The actual malice standard is not an objective standard but a subjective one in which the state of mind is in issue, although there may be settings in which the alleged defamatory statements may themselves be evidence as to the state of mind of the defendant. *St. Amant*, 390 U.S. at 732.

This Court finds, from the record in this case, that there is insufficient evidence presented with convincing clarity that the statements made by McKnight or Sunseri were made with actual malice as defined above. There is no evidence that McKnight knew his statements regarding Cyanamid's orders were false and assuming that Sunseri's statements were false, there is no evidence that she knew that they were false. Further, in this Court's opinion, there is insufficient evidence that the conduct of McKnight or Sunseri was "reckless" under the actual malice standard.

Accordingly, this Court finds, viewing the evidence in the light most favorable to Cyanamid, that there is insufficient proof presented with convincing clarity that Mylan, through McKnight and Sunseri, acted with actual malice and that, therefore, there is no genuine issue of material fact since the evidence is insufficient to allow a rational finder of fact to find actual malice by clear and convincing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Therefore, the motion for summary judgment of Mylan and McKnight against Cyanamid on its amended counterclaim for defamation must be Granted.

VIII. Conclusion

For the reasons stated above, the motion of American Cyanamid Company for summary judgment as to Count I of

the Amended Complaint is GRANTED; the motion of American Cyanamid Company for judgment on the pleadings as to Count V of the Amended Complaint is GRANTED; the motion of Mylan Pharmaceuticals, Inc. as to Count I of the counterclaim of American Cyanamid Company is DENIED; and the motion of Mylan Pharmaceuticals, Inc. and Roy McKnight for summary judgment as to Count III of the counterclaim of American Cyanamid Company is GRANTED.

IT IS SO ORDERED.

The Clerk is directed to transmit certified copies of this Memorandum Opinion and Order to counsel of record herein.

ENTERED: July 27, 1993

/s/ FREDERICK P. STAMP, JR.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: Dr. Wally Edgell
Clerk, U. S. District Court
Northern District of West Virginia

by: /s/ [ILLEGIBLE]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 90-0121-C(S)
Filed: July 27, 1993

MYLAN PHARMACEUTICALS, INC.,
a West Virginia corporation,

Plaintiff and Counterclaim Defendant,

—v.—

AMERICAN CYANAMID COMPANY, a Maine corporation,

Defendant and Counterclaimant,

—v.—

ROY MCKNIGHT,

Third-Party Counterclaim Defendant.

JUDGMENT

For the reasons stated in this Court's MEMORANDUM OPINION AND ORDER RESOLVING MOTIONS FOR SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS entered on this date, the motion of American Cyanamid Company for summary judgment as to Count I of the Amended Complaint, the motion of American Cyanamid Company for judgment on the pleadings as to Count V of the

Amended Complaint and the motion of Mylan Pharmaceuticals, Inc. and Roy McKnight for summary judgment as to Count III of the counterclaim of American Cyanamid Company are GRANTED.

Counts I and V of the Amended Complaint of Mylan Pharmaceuticals, Inc. are DISMISSED and Count III of the counterclaim of American Cyanamid Company is DISMISSED.

The Clerk is directed to transmit certified copies of this judgment to counsel of record herein.

ENTERED: July 27, 1993

/s/ FREDERICK P. STAMP, JR.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.

ATTEST: Dr. Wally Edgell
Clerk, U. S. District Court
Northern District of West Virginia

By: /s/ [ILLEGIBLE]
Deputy Clerk

United States Constitution

Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
JUL 25 1995
OFFICE OF THE CLERK

(2)

No. 94-1942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STEPHEN MCKNIGHT, in his capacity as personal representative of the estate of ROY MCKNIGHT, and MYLAN PHARMACEUTICALS, INCORPORATED, a West Virginia corporation,

Petitioners,

— v. —

AMERICAN CYANAMID COMPANY, a Maine corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent American Cyanamid Company ("Cyanamid") respectfully urges that, of the two issues petitioner now seeks to raise, only the second was pressed by petitioner in, or passed on by, the courts below. That issue is:

Should Cyanamid be treated as a limited purpose public figure with respect to accusations that it had breached a marketing agreement, when Cyanamid's marketing activities, including those related to the drug in question, had not created any public controversy related to the contractual adequacy of Cyanamid's marketing efforts?

RULE 29.1 STATEMENT

In December 1994, American Cyanamid Company became a wholly-owned subsidiary of American Home Products Corporation, a publicly held Delaware corporation. Lederle Laboratories, referred to in the record, is a division of American Cyanamid Company. American Home Products Corporation may be deemed a parent of Genetics Institute, Inc. Other than wholly-owned subsidiaries, American Cyanamid Company may be deemed to be a parent of the following corporations:

B. Braun-Dexon GmBH
B. Braun-Dexon Portugal
B. Braun-Dexon S.A.
Bionet, S.A.
Biotechnology R & D Corp.
CY Barranquilla S.A.
CY Kimyevi Madde ve ILAC
Cyanamid Chile Limitada
Cyanamid India Limited
Cyanamid Italia S.p.A.
Cyanamid Korea Inc.
Cyanamid (Pakistan) Ltd.
Cyanamid Taiwan Corp.
Cyanotech Corporation
Cytec Industries, Inc.
Durachemie GmBH & Co. KG
Eximp S.A.
Immunex Corporation
IRBI, S.p.A.

Laboratorios Sobrino S.A.
Labs Lederle SA
Lederle (Japan) Ltd.
Mitsui-Cyanamid Ltd.
S. Africa Cyanamid Pty Ltd.
Laminate Industries
Prod-Distribu Sobrino S.A.
QLT Phototherapeutics, Inc.
(formerly Quadra Logic Technologies, Inc.)
Sumutex SA de CV
Suzhou Led. Pharm. Co.
Takeda Italia Farmaceutic
Yuhan-Cyanamid, Inc.

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Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987) 19

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U. S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990) 26

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Vegod Corp. v. American Broadcasting Companies, Inc., 603 P.2d 14 (1979) (en banc), *cert. denied*, 449 U.S. 886 (1980) 22

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1942

STEPHEN MCKNIGHT, in his capacity as personal representative of the estate of ROY MCKNIGHT, and MYLAN PHARMACEUTICALS, INCORPORATED, a West Virginia corporation,

Petitioners,

— v. —

AMERICAN CYANAMID COMPANY, a Maine corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent American Cyanamid Company respectfully requests that this Court deny the petition for a writ of certiorari, pursuant to which petitioner seeks review of a *per curiam* unpublished disposition of the court of appeals.

STATEMENT OF THE CASE

The petitioner, Mylan Pharmaceuticals, Inc. ("Mylan"), a Morgantown, West Virginia company, commenced this litigation against American Cyanamid Company ("Cyanamid") in federal court in West Virginia, with jurisdiction based on diversity of citizenship. Mylan sought more than $1 billion in

damages, a declaration of termination, and equitable remedies for various alleged breaches of a contract under which it had granted Cyanamid the exclusive right to market a potassium sparing diuretic drug developed by Mylan, which the FDA had approved for the treatment of hypertension. In a series of public statements, some of which predated the institution of Mylan's contract action, Mylan officials, including its board chairman Roy McKnight, and its Vice President – Investor and Public Relations Patricia Sunseri, accused Cyanamid of breaching the contract and abandoning the product, which Cyanamid sold under the Maxzide® brand name, and portrayed Cyanamid as an incompetent marketer of pharmaceuticals and an unreliable business partner.[1] These disparaging statements were widely disseminated in the industry trade press as well as in general newspapers. Cyanamid both denied the contract claims, and countersued, alleging that Mylan's and McKnight's remarks were false and had tarnished its business reputation.

Mylan moved to dismiss the defamation counterclaim under FED. R. CIV. P. 12, urging a plethora of defenses, including a variety of common law defenses and privileges. Asserting that its breach of contract lawsuit was a matter of public interest in the pharmaceutical industry, Mylan limited its assertion of a first amendment defense under this Court's decisions in *New York Times v. Sullivan*, 376 U. S. 254 (1964), *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), to the unequivocal claim that "Cyanamid is a limited purpose public figure required to establish actual or constitutional malice as a prerequisite to recovery in a defamation action based on statements to others

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[1] The Petition sets forth the alleged defamatory statements at pp. 3 to 5.

in the industry concerning this litigation." (Mylan's memorandum in support of motion to dismiss; J.A. 131.)[2] Cyanamid argued in opposition that no matter of public interest had existed prior to Mylan's own statements and the filing of its lawsuit, and that this Court's rulings in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), required rejection of Mylan's proposition that mere participation —and especially involuntary participation— in a lawsuit amounted to involvement in a "public controversy" for purposes of applying the limited purpose public figure standard. (Cyanamid's memorandum in opposition to motion to dismiss at 23-26.) Mylan made no argument that Cyanamid should be treated as an all-purpose public figure, either on the basis of its status as a corporation or on any other basis.

The trial court denied Mylan's motion to dismiss the defamation counterclaim, noting that the issue of Cyanamid's public figure status was "a matter which must be developed through appropriate discovery and cannot be decided merely by looking at the four corners of the ... counterclaim." (Mem. Opinion and Order, filed Feb. 20, 1992; J.A. 278, 284.) The trial court also noted a willingness to consider the issue again on summary judgment. (*Id.*, J.A. 285.)

Shortly prior to trial, Mylan again sought to dispose of Cyanamid's defamation counterclaim, this time seeking summary judgment under FED. R. CIV. P. 56. Mylan had not

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[2] References to "J.A. __" are to the designated pages in the parties' Joint Appendix to the Record on Appeal below. References to "App. __" are to the designated pages of the Appendix filed herein. Materials cited as "Mylan's" were filed jointly on behalf of Mylan and McKnight.

developed a factual record regarding either the existence of a public controversy or the voluntariness of Cyanamid's role in any such public controversy, and failed to assert that any uncontested facts relating to these issues justified granting its motion. Instead, again relying solely upon the existence of its lawsuit as a factual predicate, Mylan reiterated the specific proposition that "[u]nder these circumstances, Cyanamid is a 'limited purpose' public figure required to show 'constitutional malice' in order to prevail on its defamation claim." (Mylan's memorandum in support of motion for summary judgment; J.A. 303.) Again, Mylan did not argue that Cyanamid should be treated as an all-purpose public figure.

Two weeks prior to trial the district court granted Mylan's motion, ruling that Cyanamid was a limited purpose (or "vortex") public figure under this Court's 1974 decision in *Gertz*. The court did not address the issue of whether Cyanamid could be treated as an all-purpose public figure. The court also ruled that the evidentiary record would not support a finding of constitutional malice and thus dismissed the counterclaim. (Mem. Opinion and Order, filed July 27, 1993; J.A. 1146-59.)

In addressing the limited purpose public figure issue, the district court found that by entering into the Maxzide® marketing agreement, and then by marketing the drug with an intensive launch and aggressive follow-up campaign, Cyanamid had "volunteered for an activity out of which publicity was generated through the comments made by McKnight and Sunseri." (*Id.*, J.A. 1156.) The trial court also noted: "[c]ertainly, Cyanamid's involvement with this major drug in a highly competitive and regulated industry would lead it to foresee the activity out of which the alleged defamatory statements would occur." (*Id.*, J.A. 1157.)

Following an extended jury trial in which Cyanamid defeated each of Mylan's breach of contract claims, Cyanamid appealed, among other things, the grant of summary judgment against its defamation counterclaim. Cyanamid urged that the trial court had erred by failing to follow controlling precedent of this Court and in the Fourth Circuit requiring that, before a finding of limited purpose public figure status can be made, a "'pre-existing involvement in the particular matter of public concern and controversy'" on the part of the defamation plaintiff must be established. (Cyanamid's brief in support of appeal at 19 (citing *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 687 (4th Cir. 1989) (*"Veribanc"*)). Cyanamid noted that the record failed to establish any direct link between Cyanamid's promotion of Maxzide® as a treatment for hypertension and the issues raised by Mylan's and McKnight's defamatory statements: Cyanamid's probity as a contracting partner, and its competence as a marketer. Mylan's defamatory statements thus did not address a "matter of public concern or controversy" in which Cyanamid had a "pre-existing involvement." *Veribanc*, 866 F.2d at 687. Cyanamid noted further that, under applicable precedent defining a "matter of public concern," it could not be said that Mylan's defamatory statements addressed such an issue at all. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-63 (1985) (speech "solely in the individual interest of the speaker and its specific business audience" does not concern a public issue, and does not require the protection of the "actual malice" standard).

In an unreported per curiam disposition,[3] the Court of Appeals for the Fourth Circuit reversed, holding that no public controversy existed in this case.[4] It found instead the conflict between Mylan and Cyanamid was "a purely private contractual dispute" notwithstanding any public attention it had drawn. Thus, Cyanamid was not a limited purpose public figure and proof of actual malice (which the district court had ruled was lacking) was not necessary for Cyanamid's claim. No rehearing was sought by the petitioners, and no suggestion for rehearing en banc was made.[5]

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[3] Under Sections 36.5 and 36.6 of the Internal Operating Procedures of the Court of Appeals for the Fourth Circuit (1994) ("4th Cir. I.O.P."), unreported dispositions are not deemed to have precedential value, although citation to such decisions is not barred absolutely. In the Fourth Circuit, the decision not to publish an opinion implies a determination by the author of the opinion or by a majority of the panel that, among other things, the opinion does not involve a legal issue of continuing public interest, and does not create a conflict with a decision of another circuit. *See* 4th Cir. I.O.P. Section 36.4, quoted *infra*, p. 11.

[4] The court of appeals rejected two other claims of error made by Cyanamid and also affirmed the jury verdicts and judgments against Mylan on its breach of contract claims which Mylan had raised in cross appeals.

[5] Following remand, Cyanamid moved under 28 U.S.C. §1404(a) (1988) to transfer the case from West Virginia to New Jersey for trial of the defamation counterclaim, the only remaining claim in the case. On May 30, 1995, the district court entered an order granting that motion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THRESHOLD REASONS TO DENY THE PETITION

A. The First Issue Presented By Petitioners was Neither Pressed, Nor Passed On by the Courts Below.

The Court should deny petitioners' attempt to obtain review of the all-purpose public figure issue because they failed to press that issue in the courts below, and neither court addressed it. This Court observes a settled rule that, except in extraordinary circumstances, it will not review a question "not pressed or passed upon below." *U.S. v. Williams*, 504 U.S. 36, 41 (1992) (petition not dismissed because issue was expressly decided below); *Sisson v. Ruby*, 497 U.S. 358, 359 (1990) (declining to consider argument because petitioner failed to raise it below); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (same); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 329 (1967) (declining to consider argument because petitioner failed to raise it below); *Lawn v. United States*, 355 U.S. 339, 362 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below.") (citations omitted); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("[The Supreme Court] sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). Mylan raises no exceptional circumstances warranting issuance of the writ of certiorari.

This Court has traditionally refused to review issues not raised or passed on below because the "decision to grant certio-

rari represents a commitment of scarce judicial resources ...." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). It is particularly appropriate for the Court to decline to consider issues not fully aired below because "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

Petitioners' sole reference to the all-purpose public figure issue in their briefing before the court of appeals was in a footnote: "By arguing that Cyanamid is a limited purpose public figure Mylan does not foreclose the possibility that Cyanamid is an all-purpose public figure." (Opening and Answering Brief of Appellees at 49, n.30 (citation omitted)). Mylan and McKnight seek to dignify this non-argument as a "*suggestion* that Cyanamid could be held to be an all-purpose public figure[,]" but they are forced to concede that the court of appeals ignored this off-hand mention of an issue that was neither briefed by the parties nor developed in the factual record. (Petition at 9 (emphasis added)).

The record below in this case regarding the all-purpose public figure issue falls woefully short of the standards this Court has articulated regarding the adequate preservation of an issue for review by writ of certiorari. In *City of Canton v. Harris*, 489 U.S. 378 (1989), for example, petitioner was a municipality challenging the actionability under 42 U.S.C. § 1983 of an alleged failure to train police officers to determine when detainees required medical assistance. Respondent argued that the writ should be dismissed as improvidently granted on the ground that petitioner had failed to press that issue in the courts below, and, in fact, had arguably conceded actionability. The Court declined to dismiss the writ, noting that although the

"petitioner's litigation posture with respect to the questions presented here has not been consistent ...," petitioner had sufficiently pressed its argument for review purposes because, "at each stage in the proceedings below, petitioner contested any finding of liability on this ground, with objections of varying specificity." *Id.*, at 384. The Court also noted, however, that even though the litigation posture of the petitioner had permitted the Sixth Circuit to render a decision on the question presented for review, the petitioner's inconsistent presentations of the issue below "might have been so inexact that we would have denied certiorari had this matter been brought to our attention at the appropriate stage in the proceedings." *Id.*, at 385; *see* Sup. Ct. R. 15.1 ("Any defect of this sort in the proceedings below may be deemed waived ... if not called to the attention of the Court by the respondent in the brief in opposition.") If the degree of argument presented by petitioner in *City of Canton* rendered questionable the exercise of the writ in that case, the utter neglect of the all-purpose public figure issue by petitioners below cannot possibly lead to the issuance of the writ to review that issue in this case.

B. The Opinion Below is an Unpublished Disposition and Does Not Warrant Review.

The decision below is an unpublished disposition, the significance of which is defined by 4th Cir. I.O.P. Sections 36.5 and 36.6. Those sections state in relevant part:

> *36.5 Unpublished dispositions.* Unpublished opinions give counsel, the parties and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court.

> They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel.
> ...
>
> Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.
>
> *36.6 Citation of unpublished dispositions.* In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs or oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.
>
> If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. ...

The significance of these statements by the Circuit, directly affecting the disposition for which review is sought here, is highlighted by the complementary statement in 4th Cir. I.O.P. Section 36.4 regarding the considerations applicable to the decision to publish an opinion:

36.4 Publication of decisions. Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains an historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believe the opinion satisfies one or more of the standards for publication, and all members of the court have acknowledged in writing their receipt of the proposed opinion. ...

Cyanamid respectfully submits that the same considerations that prompt this Court, in the ordinary course, to decline issuance of the writ in cases in which an issue has not been pressed or passed on below, suggest that the Court should similarly decline to issue the writ in cases in which the reasoning of the court below may not be fully articulated.

In the unpublished disposition at bar, the Fourth Circuit explicitly applied a two-part test for determining if a defamation plaintiff has limited purpose public figure status it

had set forth and analyzed in detail in a very recent published decision, *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994), a case decided after this case had been briefed below. (App. 6a). In *Foretich*, a case that petitioners inexplicably fail to draw to this Court's attention, the Fourth Circuit conducted an exhaustive historical review of the development of the limited purpose public figure doctrine by this Court in *Gertz*, *Firestone*, *Wolston*, and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), culminating in a two-part inquiry for determining public figure status: "[f]irst, was there a particular '*public* controversy' that gave rise to the alleged defamation? Second, was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify 'public figure' status?" *Foretich*, 37 F.3d at 1553 (emphasis in original). The court then examined its own application of that doctrine through an extensive series of cases including *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir.) (en banc), *cert. denied*, 501 U.S. 1212 (1991);*Veribanc*, 866 F.2d 681; *National Found. for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98 (4th Cir.), *cert. denied*, 464 U.S. 830 (1983) (*"NFCR"*); *Fitzgerald v. Penthouse Int'l Ltd.*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983), and *Jenoff v. Hearst Corp.*, 644 F.2d 1004 (4th Cir. 1981). In addition, the court in *Foretich* provided a painstaking exposition of the fact-bound inquiry that guided its application both of the two-part, public controversy/ plaintiff's participation inquiry, and of the multi-factor test it had developed to assess the latter half of that inquiry —an aspect of the analysis not reached in the case at bar, in which the court below terminated its inquiry when it found that no public controversy existed. Even a cursory comparison of the

case at bar with the complete analysis set forth in *Foretich* strongly suggests that, if this Court were inclined to re-examine the now well-developed limited purpose public figure doctrine of *Gertz*, this case would be a poor vehicle for such a re-examination, as it presents only one element, the inquiry into the existence of a public controversy, of the multifaceted analysis required to implement *Gertz*, and does so in a highly particularized factual context offering little opportunity for a broadly prescriptive analysis.

II. THE HOLDING BELOW DOES NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS, INCLUDING *GERTZ*, AND POSES NO CONFLICT AMONG THE CIRCUITS.

The concept of a limited purpose public figure grew out of the landmark decision in *New York Times v. Sullivan*, and was articulated by the Court in *Gertz*, following less successful attempts to formulate a rule harmonizing state law concerns for protecting the reputational interests of persons other than public officials with First Amendment concerns in *Curtis Publishing Co.*, and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). In *Gertz*, the Court delineated three potential classes of public figures whose reputational interests would be subordinated to the public interest in robust debate over matters of public concern protected by the First Amendment. The Court identified an "exceedingly rare" class of persons who acquire involuntary celebrity (*id.*, at 345), but the principal distinction the Court drew was between an all-purpose public figure and a limited purpose public figure. That distinction was succinctly expressed as follows:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Id., at 351.

The Court emphasized that an evidentiary showing of involvement on the part of the defamation plaintiff in the particular public controversy giving rise to the defamation is essential to the invocation of First Amendment protections by the defamation defendant. Thus, although the defamation plaintiff in *Gertz* had "long been active in community and professional affairs," had "served as an officer of local civic groups and of various professional organizations" and had "published several books and articles on legal subjects" (*id.*, at 351), he was not thereby deemed to have cast off the status of a private individual:

> We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. *It is preferable to reduce the public-figure question to a more meaningful*

> *context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.*

Id., at 352 (emphasis added).

The *Gertz* decision represented a successful effort by the Court to "come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom*'s diversity." *Id.*, at 354 (Blackmun, J., concurring.)[6] The majority in *Gertz* explicitly recognized that the balance it sought to strike between the competing and sometimes conflicting values of a robust and unconstrained public discourse on the one hand, and the reputational interests of private persons on the other, is a difficult and fact specific task that might be more suited to a case-by case analysis than the promulgation of a general rule. The Court also recognized, however, that an *ad hoc* approach was unfeasible, because it "would lead to unpredictable results and uncertain expectations, and it could render [the Court's] duty to supervise the lower courts unmanageable." *Id.*, at 343. It therefore intentionally chose to create "broad rules of general application[,]" acknowledging that "it is often true that not all of the considerations which justify the adoption of a given rule will obtain in each particular case under its authority." *Id.*, at 343-44.

Since its decision in *Gertz*, the Court has addressed the distinction between a private plaintiff and a limited purpose public figure three times, in *Firestone*, 424 U.S. 448,

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[6] In *Rosenbloom*, a plurality of the Court, in an opinion by Justice Brennan, had adopted a test that protected defamatory falsehoods regarding private individuals if the statements concerned matters of general or public interest. 403 U.S. at 52.

Hutchinson, 443 U.S. 111, and *Wolston*, 443 U.S. 157. Taken together, these four cases mandate the "two-part inquiry" identified by the Fourth Circuit in *Foretich* and earlier reported decisions, and applied below in the instant case. In each of the three cases following *Gertz*, the Court devoted specific attention to the first element of that inquiry, the existence of a particular public controversy. *See*, *Firestone*, 424 U.S. at 453-55 (holding that the divorce proceedings of Palm Beach socialite Mary Alice Firestone did not constitute a public controversy); *Hutchinson*, 443 U.S. at 135 (no particular public controversy existed regarding Hutchinson's behavioral research); *Wolston*, 443 U.S. at 166, n. 8 (no public controversy in the sense of public debate existed with respect to grand jury investigation into Soviet espionage activities in the U.S.) Thus, the determinative analysis in the case at bar, the inquiry into the existence of a particular public controversy, is the single area in which this Court has given the greatest amount of guidance.

Petitioners assign error to the Fourth Circuit's treatment of the public controversy analysis in this case, on the ground that the Fourth Circuit's approach "improperly constricts the definition of 'public controversy' for purposes of the limited public figure analysis." (Petition at 21.)[7] Petitioners seek to support this *ipse dixit* by suggesting that the reportage given to

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[7] Petitioners also object that the Fourth Circuit's analysis below "wholly abandons *Gertz*'s command that a plaintiff's access to the media and assumption of the increased risk of defamatory criticism be taken into account on the question of public figure status ...." (Petition at 21.) They are in error. When relevant, those factors are considered in the second part of the two-part test established under *Gertz* and its progeny. That inquiry was not reached below, because the court of appeals, applying the first part of the test, found that the alleged defamatory statements had not been made in the context of a preexisting public controversy.

the alleged defamatory statements demonstrates that the "alleged breach of contract as to the marketing of Maxzide® [was] hardly an exclusively 'private' matter." (Petition at 22.) This assignment of error lies at the heart of petitioners' plea for review. In a perfervid peroration they argue that:

> When a large, publicly held corporation such as Cyanamid has taken the initiative to throw its massive resources and enormous influence behind the marketing and promotion of a highly regulated product important to the welfare of hundreds of thousands of people and subject to wide debate and discussion within the medical, pharmaceutical and investment communities, it cannot reasonably be said that speech critical of the marketing and promotion of the product is "purely private" and "d[oes] not deal with any issue that could potentially affect the public" —or that the corporation is a "private figure" as to such speech. Review by this Court is necessary to prevent the kind of misconstruction of *Gertz*'s "public controversy" standard that leads, as it did in the Fourth Circuit here, to a result so at odds with both the letter and spirit of *Gertz*.

(Petition at 27.)

Petitioners' assignment of error is mistaken (although even if error were present, mere error would not justify the issuance of the writ). Their argument is founded upon a misunderstanding of the applicable law, and a misinterpretation of the findings made by the court of appeals below.

First, the relevant distinction established by this Court is not one between "exclusively 'private' matter[s]" and matters in which the public has shown some interest, but between

matters of public controversy, understood as "specific public dispute[s] that [have] foreseeable and substantial ramifications for persons beyond its immediate participants" (*Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) (analysis cited with approval in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 n.3 (1986)), and all other matters, whether or not they attract public interest or curiosity. When this distinction is correctly understood, it can be seen to apply in this case to differentiate sharply between any public issue related to hypertension therapy using Maxzide® or other potassium sparing diuretics, and the essentially private issue of whether Cyanamid had breached its contract with Mylan —issues that petitioners struggle in vain to conflate.

Second, neither court below, reviewing the factual record in this case, found that any public controversy whatever regarding the contractual adequacy of Cyanamid's marketing efforts for Maxzide® preexisted petitioners' defamatory statements. Moreover, the court of appeals took into account the precise argument petitioners advance here, and specifically found that the defamatory statements "did not deal with" (that is, were wholly unrelated to) any public controversy relating to Maxzide® itself, or otherwise affecting the public:

> No public controversy exists in the present case. The conflict between Mylan and Cyanamid is a purely private contractual dispute about whether Cyanamid used its best efforts to market Maxzide. The allegedly defamatory statements dealt only with the adequacy of Cyanamid's marketing efforts; they did not deal with any issues that could potentially affect the public, such as Maxzide's effectiveness or whether Maxzide would

> continue to be distributed. The general public will not be affected by the outcome of this dispute.

(App. 7a.)

Although petitioners suggest the existence of a conflict in principle between the Fourth Circuit's analysis of the public controversy issue in this case and the analyses employed in two decisions from the District of Columbia Circuit, and possibly cases from the Second and Third Circuits, plainly no such conflict actually exists —unless petitioners' objection to the Fourth Circuit's analysis is predicated upon its failure to use the precise words "wholly unrelated" in some talismanic fashion. Although petitioners appear to take the position that the Fourth Circuit applies a different legal test for the relationship between the alleged defamatory statements and the preexisting public controversy than other courts do, petitioners are mistaken on two grounds. First, the Fourth Circuit did not create a legal test for the degree of relationship, but rather made a fact-bound determination that no such relationship existed. Second, in the cases petitioners cite as displaying a conflict in principle with the Fourth Circuit's approach, the courts actually engage in precisely the same sort of factual analysis; the only genuine difference discernible between those cases and this is the outcome of that analysis. *See Tavoulareas v. Piro*, 817 F.2d 762, 773-74 (D.C. Cir.) (en banc) (allegedly defamatory report of nepotism on the part of president and chief executive officer of second largest U.S. oil company found to be "not 'wholly unrelated' to a public controversy where the credibility and integrity of representatives of the oil industry had become an issue[;]" plaintiff found to have personally spearheaded industry response in that public debate), *cert. denied*, 484 U.S. 870 (1987); *Waldbaum*, 627 F.2d 1287, 1299-1300 (public

controversy preexisted regarding commercial viability of cooperatives and certain related policies that plaintiff was publicly identified with; article complained of was "within the protected sphere of reporting" as comment upon the practical outcome of those publicly debated policies); *see also, Contemporary Mission, Inc., v. New York Times*, 842 F.2d 612, 619 (2d Cir.) (article recounting history of religious and business controversy regarding group claiming to be Roman Catholic clergy members constitutionally protected because intertwined controversies remained matters of public concern), *cert. denied*, 488 U.S. 856 (1988); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1082-86 (3d Cir.) (illegal drug trafficking was preexisting public controversy affording constitutional protection to article on marijuana agribusiness in the U.S. naming plaintiff among other examples of lawyers or law students publicly identified as participants in that business), *cert. denied*, 474 U.S. 864 (1985).

Although petitioners characterize the defamatory statements here as "speech critical of the marketing and promotion of the product" (Petition at 27), they paint with far too broad a brush. The comments complained of here as defamatory cannot be equated, for example, with those of a public interest group complaining of excessive promotion of an older therapy or of inflated product claims, or of a physicians' organization criticizing direct-to-consumer advertising of prescription drugs. Whether or not such remarks would ultimately be afforded the protection of the *Sullivan* "actual malice" standard, the court of appeals would not have described them as having no effect on an issue of genuine concern to the general public. Here, to the contrary, the remarks complained of are the comments of one party to a contractual dispute about the alleged breach by the

other party. The court of appeals was unquestionably correct in describing this dispute as a private quarrel, the outcome of which would not affect the general public.

III. NO CONFLICT REQUIRING THIS COURT'S GUIDANCE EXISTS AMONG THE CIRCUITS OR STATE COURTS OF LAST RESORT REGARDING THE PROPER APPLICATION OF *GERTZ* TO CORPORATE DEFAMATION PLAINTIFFS.

A. Petitioners Fail to Establish the Existence of a Conflict In Principle Regarding the Treatment of Corporate Plaintiffs Under *Gertz*.

Although petitioners strain to find a basis for the exercise of the writ in this case in what they describe as the "especially difficult" issue of determining public figure status in cases in which the plaintiff is a corporation (Petition at 10), they are unable to identify any genuine conflict in principle among the circuits or the highest state courts regarding the application of *Gertz* in such cases. Petitioners cite few cases displaying any explicit doctrinal divergence from the analysis in *Gertz*, and those isolated cases neither deviate from *Gertz* in result, nor pose any conflict of a type this Court should address.

Petitioners lay greatest stress upon *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976). In that case, the district court opined that the private interests the Court sought to protect in *Gertz* were personal interests of a type not "associated with corporate activity." *Id.*, at 955-56. Noting that traditional tort rules in the District of Columbia permitted a corporation to maintain a defamation action to recover for false imputations regarding its financial

soundness or business ethics, the district court recognized that corporations do have some reputational interests meriting protection. *Id.* It attempted to accommodate those interests by applying what it considered to be the plurality rule from *Rosenbloom*, holding that "actual malice must be proven with convincing clarity in any libel action brought by a corporation against a mass media defendant, if the defendant establishes that the publication in issue concerned matters of legitimate public interest." *Id.*, at 956. Petitioners cite no subsequent decisions that follow *Martin Marietta*; in particular, they cite no decision of any circuit court or state court of last resort that takes the same approach.

Petitioners cite *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 487-88 (Minn. 1985) (en banc), as another example of a court that has adopted a wholly different analysis in place of that prescribed in *Gertz* because the *Gertz* analysis "so ill-fits the corporate defamation plaintiff." (Petition at 12.) In that case, however, no clear-cut rejection of *Gertz* can be found. Indeed, the court in *Jadwin* adopted the limited purpose public figure category established in *Gertz* and applied it to the corporate plaintiffs in that case, in the process distinguishing "between the ordinary incidents of a corporation's manufacturing and selling products on the one hand, and a corporation's business activities which are particularly clothed with the public interest on the other." *Id.*, at 487. The court then used this distinction to demonstrate an underlying doctrinal consistency among cases that petitioner here portrays as being in conflict, including *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Vegod Corp. v. American Broadcasting Companies, Inc.*, 603 P.2d 14 (1979) (en banc), *cert. denied*, 449 U.S. 886 (1980); *American Benefit*

Life Ins. Co. v. McIntyre, 375 So. 2d 239 (Ala. 1979); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977), and *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977). In dealing with a corporate defamation plaintiff, each of these courts considered whether the disputed statements touched upon an area of public concern, or upon the smaller range of issues within which a corporation's reputational interests are akin to those of a private natural person. The range of outcomes in those cases for the most part reflects differing factual circumstances, rather than divergent views of the applicable law, and the approach followed in each case is fully consistent with the public controversy analysis mandated by *Gertz*.

It is also significant to note that the analysis this Court adopted in *Gertz* was not intended to "federalize" the law of defamation. Under *Gertz*, states were explicitly permitted "to retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *Id.*, at 345-46. By implication, states also retain the ability under *Gertz* to make judgments concerning such essentially state law issues as the nature and extent of a corporation's reputational interests that will be recognized by the tort law, and the degree of protection that will be afforded those interests, as long as the application of state law does not invade the protected free speech interests identified by the Court. Thus, any difference on this point that results from a refusal by a state to recognize any private reputational interest on the part of a corporation does not pose an issue that this Court needs to address, because it expands, rather than constricts, the scope of protected expression. *Compare, e.g., Martin Marietta*, 417 F. Supp. at 955 (in District of Columbia,

corporation has no personal reputation and may be libelled only as to limited issues), *with Bruno & Stillman, Inc.*, 633 F.2d at 590 (no support in applicable New Hampshire libel law for "assumption that a corporation's interest in protecting its reputation is less important than that of an individual person[,]" expressly distinguishing *Martin Marietta*.)

In the various circuits in which this issue has been considered, little difficulty in applying *Gertz* to corporate defamation plaintiffs has been encountered. To the contrary, the decisions of the various circuits have been marked by a readily discernible consistency both in analysis and outcome. Cases decided in the Fourth Circuit are exemplary in this regard. The approach taken there to cases involving corporate plaintiffs begins with the observance of this Court's admonition in *Gertz* (cited above at p. 14) that the "public figure question" demands a fact-specific, contextual analysis. *Gertz*, 418 U.S. at 352, *cited* at *Veribanc*, 866 F.2d at 687, and at *NFCR*, 705 F.2d at 101. And, indeed, engaging in a close contextual analysis in each of those cases enabled the court to make reasoned distinctions about the limited purpose public figure status of the respective plaintiff corporations.

In *NFCR*, the plaintiff foundation had engaged in "massive solicitation efforts" ostensibly to raise funds for research into a cure for cancer. The Foundation accompanied many of its solicitations with "claims and comments" in which "it extolled its judicious use of donated funds in finding a cure for cancer, where it declared its objective to make 'NFCR a household word,' and where it asserted the need 'to present [NFCR's] case to the jury of the American people.'" *Id.*, at 101. Based on these facts, the court had no difficulty finding that the Foundation had "thrust itself into the public eye," and that it

"did not unwittingly become the subject of publicity with respect to its approach to cancer research or its use of donated funds." *Id.*, at 101, 102. The court therefore found that the Foundation was a limited purpose public figure with respect to those specific issues, and applied the "actual malice" standard to the Foundation's claim that it had been defamed by a report issued by the Council of Better Business Bureaus that accused the Foundation of spending too high a percentage of the funds it raised on administration and fund-raising, as opposed to research, and challenged statements in the Foundation's fund raising materials as inaccurate and misleading.

In *Veribanc*, the court applied the same approach, but arrived at a different outcome based upon differing facts. In that case, plaintiff Blue Ridge Bank was found to occupy "a position of considerable importance" in its community, had engaged in extensive promotional efforts for its banking services, and had demonstrated access to the media. *Veribanc*, 866 F.2d at 686-87. The court nevertheless found that the Bank was not a limited purpose public figure with respect to the issue of its corporate financial health, and was not required to meet the "actual malice" standard in a defamation action against a reporting service that had mistakenly included the Bank on a list of potentially insolvent banks. *Id.*, at 687-88, *compare*, *Dun & Bradstreet, Inc.*, 472 U.S. at 761-63 (speech "solely in the individual interest of the speaker and its specific business audience" does not concern a public issue, and does not require the protection of the "actual malice" standard). The court found that the Bank had not thrust its internal operations (specifically, its financial health) into the public eye, and thus had not voluntarily injected itself, or been drawn into, a "pre-existing public controversy" over that issue. *Id.* The court distinguished

NFCR factually on the ground that the Foundation had itself fomented a public issue concerning its use of funds:

> Central to our conclusion [in *NFCR*] was both the presence of extensive advertising (creating a high public profile and demonstrating media access) *and a direct relationship between the promotional message and the subsequent defamation* (indicating plaintiff's pre-existing involvement in the particular matter of public concern and controversy.)

Id., at 687 (emphasis added).

In the Third Circuit, a similar analytical approach has yielded results consistent with those in *NFCR* and *Veribanc* in a closely analogous pair of cases. *Compare, Steaks Unlimited v. Deaner*, 623 F.2d 264 (3d Cir. 1980) (finding the corporate defamation plaintiff to be a limited purpose public figure on the issue of the quality of the meat it sold through an intensive media campaign extolling its product, in the wake of local television news coverage of alleged misrepresentations about the quality of that meat), *with U. S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 939 (3d Cir.) (refusing to invoke limited public figure standing in a defamation action arising out of a comparative advertising campaign between two health care providers, and holding: "[w]e believe a corporation must do more than claimants have done here to become a limited purpose public figure ...."), *cert. denied*, 498 U.S. 816 (1990). Similar analyses, applying *Gertz*, have yielded compatible results in other circuits; *see Silvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491, 1494-98 (11th Cir. 1988) (corporate plaintiff, operator of a jai alai fronton, voluntarily entered highly regulated industry with

few participants and foreseeably held prominent role in, and had ability to influence outcome of, public controversy over corruption in jai alai gambling); *Golden Bear Distrib. Sys., Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 9552 (5th Cir. 1983) (corporate defamation plaintiff did not "thrust itself" into public controversy by mere advertising of services); *Bruno & Stillman, Inc.*, 633 F.2d at 589-92 (public figure status not imposed upon corporate defamation plaintiff which was "paradigm middle echelon, successful manufacturer-merchant" when no pre-existing public controversy regarding product quality, or evidence of scale or nature of promotional efforts appeared in record).

Cyanamid submits that none of these cases yields a result that is repugnant to the applicable First Amendment concerns, or that exhibits an analytical approach that is in conflict, as a matter of principle, with the analyses undertaken by other courts in similar cases. A careful reading of the relevant cases shows that the instances of a "clear split among jurisdictions" that petitioners purport to discern regarding the weight given to the factors of whether the plaintiff corporation is in a regulated industry (Petition at 14), or whether the plaintiff corporation employs extensive advertising (Petition at 16), are in fact only differences in emphasis arising out of particularized, fact-bound inquiries in each case. Despite strenuous efforts, petitioners have failed to identify any cognizable conflict in this area meriting this Court's consideration.

B. Even If the Issue were Presented Here, Cyanamid Should Not Be Considered an All-Purpose Public Figure.

Although the record below does not support the raising in this case of any issue regarding the application of the all-purpose public figure category delineated in *Gertz*, (as Cyanamid has shown above at pp. 6-9), petitioners assert the existence of a conflict regarding that issue between the Fourth Circuit and the Fifth Circuit. The asserted conflict proves to be only a speculative exercise on petitioners' part, however, based upon petitioners' distorted reading of *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325 (5th Cir. 1993), *cert. dismissed*, __ U.S. __, 114 S.Ct. 1587 (1994) —a case in which the plaintiff corporations were specifically held to be private figures for purposes of a libel claim.

In *Snead*, a U.S. railroad and its president brought an action for breach of a confidential relationship and misappropriation of trade secrets against two British corporations, which counterclaimed for libel based upon a press release issued by plaintiffs accusing them of "international theft," "industrial espionage," and "international piracy." The plaintiffs' claims were dismissed after a bench trial, and damages were awarded on the libel counterclaim. Plaintiffs appealed the award of damages on the grounds, among others, that the British corporations were public figures, and that "actual malice" had not been proved.

Contrary to petitioners' assertions here (Petition at 19), the Fifth Circuit in *Snead* did not purport to set out a three-part test for all-purpose public figure status. Rather, the court disavowed the existence of any general rule, stating:

> Because the two *Gertz* justifications for the public figure/private figure dichotomy do not suggest a general rule to be applied to corporations, the inquiry must be made on a case-by-case basis, examining all the relevant facts and circumstances. We suggest several factors here but we do not suggest that these are the only factors to consider.

Id., at 1329. On the facts in *Snead*, the court found that the corporations in questions were private figures.

No conflict between *Snead* and the Fourth Circuit's analysis in this case actually exists. The "conflict" petitioners assert is merely one between the outcome below, and the result they assert would have obtained had the Fifth Circuit applied what they assert to be the rule in *Snead* to facts of this case. (Petition at 18-20.) But Cyanamid submits that such "thought-experiments" are not the basis upon which this Court exercises its prerogative of review by writ of certiorari. The court below was not asked by petitioners to consider the all-purpose public figure issue, and petitioners err in their hypothetical application of *Snead* to this record.[8] Petitioners identify no record facts here that bear upon two of the three relevant factors identified in *Snead*, including "the notoriety of the corporation to the average individual in the relevant geographical area" or "the frequency and intensity of media scrutiny" that Cyanamid normally receives. *Id.*, at 1329.

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[8] It should be noted that much, if not all, of the factual material petitioners draw from the record to support their position now was absent from the record before the district court when it granted summary judgment before trial, and none of it was cited from the trial record to the court of appeals by petitioners in response to Cyanamid's appeal below.

Ultimately, petitioners appear to urge a stark and radical change in the law: they invite the Court to hold either that all corporations, or all corporations of an unspecified size, be treated as public figures in all cases. They offer no example of any court below that has so held, and no well-reasoned public policy basis arising out of the case at bar to support this Court's consideration of such a fundamental change in the law. Cyanamid respectfully submits that the petition is therefore utterly without merit.

CONCLUSION

For the foregoing reasons, respondent American Cyanamid Company respectfully submits that the petition should be denied.

Dated: Washington, D.C.
July 25, 1995

Respectfully Submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN MCKNIGHT, in his capacity as personal representative of the estate of ROY MCKNIGHT, and MYLAN PHARMACEUTICALS, INCORPORATED, a West Virginia corporation,

Petitioners,

—v.—

AMERICAN CYANAMID COMPANY, a Maine corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In its opposition brief, respondent American Cyanamid Company simply does not come to grips with the central reason urged by petitioners why certiorari should be granted in this case: that this Court has never articulated standards for determining when a *corporate* defamation plaintiff is properly deemed a public figure under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). As a result, the law in this area is marked by intense conflict and confusion in both the lower federal courts and the state courts. Indeed, not until the final third of its brief does Cyanamid even acknowledge that the corporate status of a defamation plaintiff has anything at all to do with the issue presented for the Court's review. Respondent's Brief in

Opposition ("Resp. Br.") at 21. Yet, as set out in more detail below, even then Cyanamid does little more than assert that the conflicts identified by petitioners are "isolated cases" which do not reflect any "deviat[ion] from *Gertz* in result" and that the very different analyses applied by various courts "are in fact only differences in emphasis arising out of particularized, fact-bound inquiries in each case." Resp. Br. at 21, 27. To the contrary, as the petition demonstrates, the confusion among lower courts on this issue is anything but isolated; it is widespread, indisputably real, and the direct result of the absence of guidance from this Court as to the relevance of the corporate status of a defamation plaintiff.

Respondent's effort to evade the core question presented by this case is at the root of its argument that the issue of whether Cyanamid is an all-purpose (as opposed to limited-purpose) public figure was not " 'pressed or passed upon below' " and thus may not be considered by this Court. Resp. Br. at 7. There is, of course, no question that petitioners consistently took the position below that because American Cyanamid is a public figure, petitioners should be accorded the protection of the *New York Times* "actual malice" standard of liability.[1] Even apart from the fact that the argument that Cyanamid is a public figure under an all-purpose, as well as a limited-purpose, analysis *was* pressed in the Court of Appeals and at least implicitly passed upon in the District Court,[2] petitioners may advance here any alternative

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[1] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *see also Gertz, supra*, 418 U.S. at 342 (The *Sullivan* "actual malice" standard protects speech about those who are public figures "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention.")

[2] Petitioners' arguments below unquestionably focused on the limited public figure analysis. Nonetheless, as Cyanamid necessarily concedes, McKnight and Mylan contended in their brief to the Fourth Circuit that their reliance on the limited public figure argument "does not foreclose the possibility that Cyanamid is an all-purpose public figure." Opening and Answering Brief of Appellees at 49 n.30 (citing *Reliance*

legal ground to support their position that Cyanamid is a public figure. This principle was strongly reaffirmed by this Court just months ago in *Lebron v. National Railroad Passenger Corp.*, 115 S. Ct. 961 (1995). There, a plaintiff alleging that Amtrak had infringed his First Amendment rights did not, until his brief on the merits to this Court, assert that Amtrak was a governmental entity; indeed, he had expressly disavowed that position in the courts below. *Id.* at 964. In determining that the question of Amtrak's status was nonetheless properly before it, this Court stated:

> Our traditional rule is that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." . . . Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment.

Id. at 965 (citations omitted); *accord Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992); *Dewey v. City of Des Moines*,

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Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977)). What purpose would such a statement serve except to offer the all-purpose public figure argument as an alternative for affirming the District Court's adoption of the *Sullivan* standard? The fact that the Court of Appeals did not reach the issue is not dispositive upon this question. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (the " 'not pressed or passed upon below' " rule "operates (as it is phrased) in the disjunctive").

Moreover, the District Court made factual findings as to a number of characteristics of Cyanamid wholly consistent with all-purpose public figure status, including its size, its publicly-held nature, and its "considerable access to the general and financial media." Petition at 43a. The District Court discussed, as well, the "special problems [that] arise" in determining the public figure status of corporations—including that they "have no 'reputational interest' or 'feelings' " and that they are "often 'pervasively visible and powerful economic, political and social forces in American life.' " Petition at 44a-45a. Such factors apply equally to all-purpose and limited-purpose corporate public figures.

173 U.S. 193, 198 (1899); *see also Illinois v. Gates*, 462 U.S. 213, 219-20 (1983) (" '[I]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.' "). So, too, in this case: McKnight and Mylan have urged at every turn that because Cyanamid is a public figure, they should receive the protection of the actual malice standard of liability; they may therefore, as this Court has held, "formulate[ ] any argument they like[ ] in support of that claim here." *Yee*, *supra*, 503 U.S. at 535.

It is telling, moreover, that Cyanamid does not (and cannot) dispute the trial record and public record facts about itself set out in the petition which, we submit, are *alone* sufficient to support a determination of all-purpose public figure status under *Gertz*—for example, that Cyanamid is a multi-billion-dollar company, with tens of thousands of employees and tens of thousands of shareholders; that it is a leading producer nationally in a variety of product fields, including pharmaceuticals; and that it spends enormous sums of money in advertising and promotion. Petition at 17 & n.7; *see also id.* at 43a-46a (District Court findings with respect to the very characteristics of Cyanamid which *Gertz* associates with all-purpose public figure status). Petitioners are entirely content to rest upon the record presented in the petition; Cyanamid's contention that the record is " 'very likely to be inadequate' " to demonstrate its all-purpose public figure status, Resp. Br. at 8, cannot be credited.

More importantly, as the petition demonstrates, the *central* issue raised by McKnight and Mylan—the disarray in the law concerning the significance of a defamation plaintiff's corporate status—affects with equal force both limited-purpose

and all-purpose public figure analyses by lower courts. *See* Petition at 9-16 (setting forth the inconsistencies in courts' analyses and results in both limited-purpose and all-purpose public figure cases involving corporate plaintiffs). The resolution of this conflict itself justifies plenary review by this Court.[3]

Cyanamid's efforts to rationalize away the confusion and inconsistencies that have plagued the lower courts with respect to the public figure status of corporate defamation plaintiffs are unavailing. In essence, Cyanamid resorts to the argument that because courts employ a fact-specific analysis in determining public figure status, there is no "genuine conflict in principle" among them. Resp. Br. at 21. It does not begin to suffice, however, to maintain that all courts have agreed to consider "facts" in determining public figure status; the real issues are which facts and circumstances the courts should consider when the defamation plaintiff is a corporation, and how much weight they should give to those facts and circumstances. Neither *Gertz* nor any other decision of this Court provides guidance on these questions.

Cyanamid also ignores the reality that across various jurisdictions courts have not only arrived at plainly conflicting determinations of corporate public figure status but have employed disparate criteria in reaching their results—often after explicitly noting the absence of direction from this Court

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[3] Although Cyanamid devotes much of its brief in opposition to justifying the rationale underlying the Fourth Circuit's determination that it is a private figure, *see* Resp. Br. at 11-21, it does so wholly without reference to its own status and characteristics as a corporation and thus without addressing the core issue presented by the petition. Similarly, Cyanamid's extended discussion of *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994), Resp. Br. at 11-13, misses the mark because the defamation plaintiffs in that case were natural persons, not corporations. Cyanamid's argument that *Foretich* conclusively demonstrates that the Fourth Circuit was correct in this case is, we submit, without merit. More to the point, the argument provides no basis for denying the writ.

on the issue of when or whether a corporation is a public or private figure. *See* Petition at 11-16. Cyanamid asserts that these inconsistencies owe only to "differences in emphasis arising out of particularized, fact-bound inquiries." Resp. Br. at 27. But differences in emphases and facts hardly explain the fundamental disagreements among courts on such key questions—not addressed by *Gertz*—as whether corporations should be treated for purposes of the public figure determination at all differently from natural persons and whether the nature of a corporation's business, its publicly or privately held character or the level of its self-promotion exerts any impact on the analysis at all. *See* Petition at 12-16. In short, the only "underlying doctrinal consistency among cases" in this area, Resp. Br. at 22, is the repeated and explicit judicial acknowledgment that the disorderly case law leaves the courts with few if any reliable touchstones.

Finally, Cyanamid gives great weight to the fact that the Court of Appeals decision below was unpublished, suggesting that because the panel which authored it chose not to have it published—and because the Fourth Circuit's Rules disfavor citation of unpublished opinions as precedent—this Court should deem the decision unworthy of its consideration. Resp. Br. at 9-11. Petitioners are aware of no basis in this Court's Rules or its practice for such an assertion.[4] This Court is not, of course, bound by any lower court's view of the legal

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[4] Cyanamid appears to suggest, through its citation of the Fourth Circuit's Rule 36.4, that the Fourth Circuit itself regarded its decision in this case to be consonant with both its own prior decisions and with decisions of other Circuit Courts of Appeals. Resp. Br. at 10-11. We do not dispute the former; as the petition sets out, the Fourth Circuit (like some other courts) has consistently given the strictest possible interpretation to the nexus requirement in limited public figure analysis. Petition at 26-27. But as the petition also demonstrates, the Fourth Circuit's interpretation of the nexus requirement conflicts with that of at least three other Courts of Appeals. *Id.* at 26-27 & n.21. In any case, however, the circuit split on the nexus issue, while significant and independently certworthy, is secondary to the larger question presented by McKnight's and Mylan's petition.

significance of its own decisions. Indeed, review of an unpublished disposition recently resulted in one of the Court's most significant decisions regarding the First Amendment's free exercise clause. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993), *rev'g* 936 F.2d 586 (11th Cir. 1991) (unpublished decision); *see also, e.g., Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), *rev'g* 916 F.2d 718 (10th Cir. 1990) (unpublished decision); *Willoughby v. Central Illinois Light Co.*, 486 U.S. 1049 (1988), *vacating* 826 F.2d 1067 (7th Cir. 1987) (unpublished decision); *Lastimosa v. Hughes Aircraft Co.*, 486 U.S. 1050 (1988), *vacating* 823 F.2d 1552 (9th Cir. 1987) (unpublished decision).[5]

As Justice Blackmun commented in a dissent to denial of certiorari that was joined by Justices O'Connor and Souter, "The fact that [a] Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the circuit and surely is as important to the parties concerned as is a published opinion." *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting to denial of certiorari). The considerations, such as those enumerated in this Court's Rule 10.1, which genuinely *do* guide the grant of writs of certiorari militate in favor of such a grant here. As petitioners have demonstrated, and respondent has failed to refute, this case presents a federal constitutional question of special importance which is a continuing source of conflicting decisions in the state and lower federal courts and which, as both judges and scholarly commentators have repeatedly pointed out, is urgently in need of resolution by this Court.

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[5] These cases arose from Courts of Appeals which take an even dimmer view of the precedential value of unpublished dispositions than does the Fourth Circuit. *Compare* 4th Cir. R. 36.6 *with* 7th Cir. R. 53(b); 9th Cir. R. 36-3; 10th Cir. R. 36.3; 11th Cir. R. 36-2.

CONCLUSION

The petition for a writ of certiorari should be granted.

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